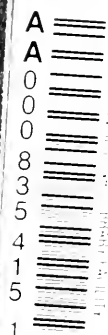


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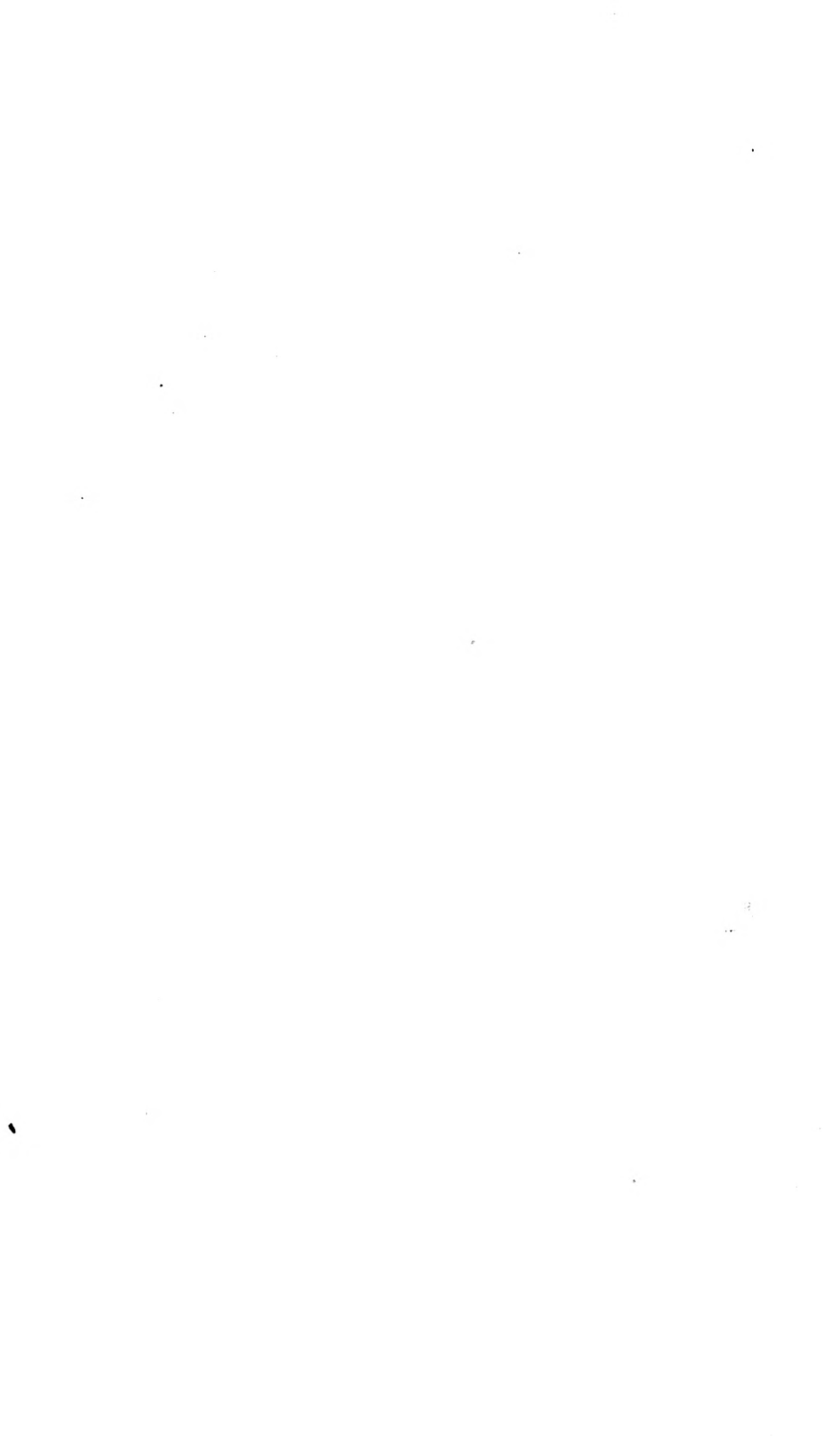
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LEADING AND SELECT AMERICAN CASES
IN THE LAW OF
BILLS OF EXCHANGE,
PROMISSORY NOTES, AND CHECKS:

ARRANGED ACCORDING TO SUBJECTS.

WITH NOTES AND REFERENCES.

BY

ISAAC F. REDFIELD

VIA

AND

MELVILLE M. BIGELOW.

BOSTON:
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1871.

P R E F A C E.

IN preparing this volume, the editors have first endeavored to present the history of commercial paper throughout its usual stages; and then to illustrate such collateral branches of the general subject as are of practical importance. The cases as far as the subject, "Discharging Indorser or Drawer," p. 544, are arranged by topics in the order of progression which bills and notes usually follow in the course of business. At this point the cases upon collateral subjects begin, and continue through the book.

The editors have aimed to present the largest possible number of valuable cases, and to illustrate as wide a range of topics as space would permit. Upon subjects involved in conflict, decisions presenting the different rulings have been selected as principal cases; and to these have been added notes, citing the authorities which have followed or rejected the doctrine of the respective cases, and stating the general current of adjudication upon the subject.

The preparation of the notes has been mainly the work of Mr. BIGELOW; and the editors have sought to present their annotations within the narrowest compass compatible with a full illustration of the subject of the work. They, like the principal cases, are selected matter; embracing mainly the decisions which were deemed to be

of practical importance to the profession. It is hoped that the selection may prove satisfactory; though it would be too much to expect that no errors of judgment have been made.

The opinions in many important cases have been presented in full in the notes, in the belief that they would prove more acceptable than any annotations that could have been made in their place.

In the citation of text-books in the notes, the original paging is uniformly referred to, unless otherwise indicated.

The following additional references and citations should be made at the places designated: In the middle of p. 63, at the end of the paragraph in which *Wilkinson v. Johnson* is first cited, add, "But see *Goddard v. Merchants' Bank*, 4 Comst. 147." At the end of the same page, add reference to "Forgery," p. 643. At the end of p. 476, add reference to *Commercial Bank of Albany v. Clark*, p. 536, and note.

Boston, March 25, 1871.

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Number of witnesses. — That a notice to an indorser was seasonably deposited in the post-office need not be proved by a single witness. If more persons than one participated in the act, the testimony of all of them should be adduced.

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Accommodation paper. Release of drawer. — An indorsee, for value, of a bill of exchange, who became such before its maturity, and in ignorance that it was given for accommodation, has a right to treat all parties thereon as liable to him according to their relative positions on the bill, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and this right is unaffected by any subsequently acquired knowledge, that the bill was given for accommodation. In such case a release of the drawer, by the holder, has no effect on the ultimate liability of the acceptor. And in this respect the rule is the same in equity as at law 581

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Commercial paper cut in halves. — If the holder of a bank-bill voluntarily cut it in halves, for the sole purpose of transmitting it by mail with greater safety, this will not affect his rights upon such bill. To entitle him to recover on the production of but one of the parts, he must show that he is owner of the whole, and account for the absence of the other part.

The parts of a divided bank-bill are not separately negotiable.

Notice by the payor of cut bills. — The board of directors of the Bank of the United States gave notice that the bank would not hold itself responsible upon any of its notes which should be voluntarily cut into parts, except on the production of all the parts; which notice was published in all the newspapers of the city of Philadelphia, at which place said bank was located; *held*, that the rights of a person in Connecticut, who subsequently became the owner of a note so cut into parts, and who was in possession of one of the parts, and who had never received the notice, were not affected by the same

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I. *AYMAR v. SHELDON.*

(12 Wendell, 439. Supreme Court of New York, October, 1834.)

Bill drawn in one country and indorsed in another. — In an action by an indorsee against an indorser of a bill of exchange drawn in a foreign country, and indorsed and negotiated to the plaintiff in New York, the law of New York must determine whether the proper steps have been taken to charge the indorser

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I. MORRISON *v.* BAILEY.

(5 Ohio State, 13. Supreme Court, December, 1855.)

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<i>Form.</i> — The following draft is not a check: W. O. & B.: Pay to B. on the 13th of July, '53, or order, three hundred dollars; it being payable on a future day designated. It is one of the essentials of a check that it shall be payable on demand.	
<i>Days of grace</i> are not allowed on checks.	
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(9 Metcalf, 306. Supreme Court of Massachusetts, March, 1845.)

<i>Certification of checks. Inherent power of teller.</i> — Evidence that the teller of a bank, during all the time of his holding office, whenever the convenience of the bank or of its customers required it, certified that checks were "good," which were drawn on the bank by its customers, when funds to the amount of such checks were to the credit of the drawers, and that his so doing was, in some instances, known to the bank, and was not forbidden, and that it was the usage of the tellers of other banks to do the same thing, does not warrant a jury to infer that the power of so doing was an original, inherent, implied power of the teller, as such.	
<i>Usage.</i> The usage of issuing certificates of deposit, by a teller of a bank, is not evidence to prove a usage of certifying checks.	
A teller of a bank, as such, has no authority to certify that a check is "good," so as to bind the bank to pay the amount thereof to any person who may afterwards present it; and a usage for him so to certify a check, to enable the holder to use it at his pleasure, is bad	721

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(16 New York [2 Smith], 125. Court of Appeals, September, 1857.)

<i>Certification of checks.</i> — A <i>bona fide</i> holder, for value, of a negotiable check certified to be good by the paying teller of the bank on which it is drawn,	
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whose authority to certify is limited to cases where the bank has funds of the drawer to meet the check, can recover of the bank the amount of the check, though the drawer had no funds in the bank, and though the certification by the teller was in violation of his duty, and for the drawer's accommodation	727
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LEADING AND SELECT CASES.



LEADING AND SELECT CASES

UPON BILLS OF EXCHANGE AND PROMISSORY NOTES.

FORM AND REQUISITES.

THOMPSON *v.* SLOAN *et al.*

(23 Wendell, 71. Supreme Court of New York, January, 1840.)

Payable in Canada money.—A written promise, executed in New York, to pay in that State a certain sum in Canada money is not a negotiable note ; but if negotiable, parol evidence is admissible to show the meaning of the term “Canada money.”

THE note in this case was dated at Buffalo, New York, signed by James Sloan and John Wilkinson, payable to the order of Johnson, Hodge, & Co., in Canada money, at the Commercial Bank in Buffalo, and indorsed by the payees. The makers and indorsers were sued jointly.

The questions in controversy were, first, whether the paper were a negotiable note ; and secondly, whether parol evidence could be received to explain the meaning of the term “Canada money,” as understood in Buffalo.

COWEN, J. A promissory note must, in order to come within the statute, like a bill of exchange, be payable in money only, in current specie ; Bayl. on Bills [1], 10 Am. ed. of 1836 ; *Ex parte Imeson*, 2 Rose, 225 ; or at least in what we can judicially notice as equivalent to money. Accordingly, a note payable in bills of country banks, *Jones v. Fales*, 4 Mass. 245, in Pennsylvania or New York paper currency, current in Pennsylvania or New York, *Leiber v. Goodrich*, 5 Cowen, 186, in notes of the chartered banks of Pennsylvania, though the note was made and payable in the State

of Pennsylvania, *M'Cormick v. Trotter*, 10 Serg. & Rawle, 94; see *Cook v. Satterlee*, 6 Cowen, 108 [*post*, 8]; in paper medium, *Lange v. Kohne*, 1 M'Cord, 115; see *M'Clarín v. Nesbit*, 2 Nott & M'Cord, 519, or in cash or Bank of England notes, *Ex parte Imeson*, before cited, 2 Buck, 1 S. P., has been held without the statute.

The farthest we have gone is, to say that a note drawn and payable here, in New York bills or specie, *Keith v. Jones*, 9 Johns. 120, or in bank-notes current in the city of New York, *Judah v. Harris*, 19 Johns. 144, is negotiable. In both cases the Court went on the ground of a right to take judicial notice that New York bills, and especially bank-notes current in the city of New York, were customarily considered and treated as equivalent to specie. And, in the last case, they said, though the defendant might have a right to pay with foreign bills current in the city, the note was still to be regarded as payable in current money.

Admitting that the note in question imports an obligation to pay in gold and silver, current in Canada, I do not see on what principle we can pronounce it to be payable in money, within the meaning of the rule. It is not pretended that coins current in Canada are, therefore, so in this State. As gold and silver they might readily be received: and so might the coin of any foreign country, Germany or Russia, for instance; but the creditor might, and in many cases doubtless would, refuse to receive them, because ignorant of their value. In law, they are all collateral commodities, like ingots or diamonds, which, though they might be received, and be in fact equivalent to money, are yet but goods and chattels. A note payable in either would, therefore, be no more negotiable than if it were payable in cattle or other specific articles. The fact of Canada coins being current here is not, at any rate, so notorious that we can judicially notice them as a universally customary medium of payment in this State; and if not, they are no more a part of our currency than Pennsylvania bank-bills. *Leiber v. Goodrich*, before cited. Nor do I perceive in the case any proof, or offer to prove, that such coins were universal currency.

This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. *Chit. on Bills*, 615, 616, Am. ed. of 1839; *Deberry v. Darnell*, 5 Yerg. 451. A note payable in pounds, shillings, and pence, made in any coun-

try, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such an instrument is to aver and prove the value of the sum expressed, in our own tenderable coin. It is payable in no other, *vide* Bayl. on Bills, 23, Am. ed. of 1836, and the cases there cited, whereas on the note in question, Canada money, a specific article, would be a lawful tender; Canada coppers, for aught I see, and, under our own decisions, bank-bills commonly current in Canada, would also be tenderable.

Nor is it necessary to deny, that had this note been made, indorsed, and payable in Canada, it would have been negotiable. It would then on its face have been payable in the current coin of the country where it is made. The objection is, that the note was made, indorsed, and payable here, in a foreign commodity, which the payee was entitled to demand specifically; and to reject gold and silver current in the United States. It is of course the same thing under the extrinsic evidence offered by the plaintiff, and received by the judge. The Canadian statute merely proved what coins were current as *Canada money*; which could not be recognized as the money of this country. In the light of that proof, the note must be read as necessarily payable in Canada money, current by law in that province. It did not improve the case, without following it with some statute making that money, as such, current here; or, at least, showing that it was, in fact, so notoriously current among us that we should be entitled to take judicial notice of the fact. The latter is the utmost, that, by our cases, the plaintiff could claim; though we have gone farther than the cases decided in any other State or country, so far as they were cited on the argument, or have come under my observation, except a case in Tennessee, *Deberry v. Darnell*, 5 Yerg. 451. The instrument was payable in North Carolina notes, yet held negotiable. In *M'Cornick v. Trotter*, I fear we were somewhat justly criticised for the high ground on which we had placed all our State bills in *Keith v. Jones*. At any rate, Mr. Justice *Duncan* very truly reminded us that New York State bills had depreciated in common with those of Pennsylvania. A remark, which he made as to the note in that case, which was payable in Pennsylvania bills, would, I apprehend, be nearly applicable to our own at some stages of our currency; viz., that "it was payable in more than forty kinds of paper of different value."

The evidence offered, that the makers were desirous to draw the note payable in Canada bills, which the plaintiff refused, tended to prove no more than that the note was intended to be payable in Canadian current coin. It was, therefore, as we have seen, irrelevant, besides being, as I think, inadmissible, because it was direct independent evidence of intention, as explained by the parties at the very time of drawing the note. Every thing of this kind which the parties declared was merged by the written agreement. The legal effect of a written agreement cannot be controlled by this kind of evidence. *Creery v. Holly*, 14 Wend. 26. Nor, in general, can a patent ambiguity be obviated by it. See Cowen & Hill's Notes to 1 Phil. Ev. 1384, 1388, *et seq.* and cases there cited. I speak of the *confessions* or *declarations* of the parties, which go to show what they meant by the words used in the writing. I do not deny that in such a case, a resort may be had to collateral circumstances. Per *Bayley, J.* in *Smith v. Doe, ex dem. Earl of Jersey*, 2 Brod. & Bing. 553; 1 Phil. Ev. Cowen & Hill's ed. 546, note 957; p. 1399, *et seq.*; *Peisch v. Dickson*, 1 Mason, 9, 11. The cases of *Cole v. Wendel*, 8 Johns. 116, and *Ely v. Adams*, 19 id. 313, were mentioned to us on the argument. I much doubt whether the latter case can be understood as conflicting at all with the distinction I have mentioned. In the former, it was doubtful which of two subjects mentioned in the writing, the parties intended to refer to, and the judge at the circuit, received evidence of the form in which the plaintiff desired the contract should be written, and to which the defendant assented. It was written in a different form, which made it ambiguous on its face. Yet the verdict was sustained on motion for a new trial, and an opinion expressed that the evidence was proper. The ambiguity, though patent, lay between *two objects only*, and the decision may be sustained by a class of authorities which make such cases an exception. *Vide* Cowen & Hill's Notes to 1 Phil. 1388, 1392. The ambiguity was not, in its own nature, unexplainable; and the only difficulty is on the kind of proof. There was, however, as the Court remarked, enough appearing on the face of the paper itself to remove the doubt. The case is sustainable on that ground, even if the contemporaneous declarations were improperly received.

But in the case at bar, extrinsic evidence of the kind offered by the defendants was, I think, admissible to prove that *Canada money* meant, in general mercantile understanding at Buffalo and in its

vicinity, *Canadian bank-bills*, and not specie, whether we regard the words used in the note as *prima facie* importing current Canadian coin, or as ambiguous on their face; in other words, leaving it doubtful whether they meant current Canadian coin or bank-notes. Such evidence was not necessary, if what I have said as to the legal effect of the words be correct, and was therefore irrelevant, and, in that view, inadmissible. But suppose I am mistaken in saying that this note was not negotiable as being payable in the legal money of the province, then it was competent to prove the customary meaning of the words. The cases are quite numerous, that though the meaning of the word be perfectly well settled in general language, yet if a secondary meaning has been affixed to it in commercial usage, in a certain region of country, or among certain classes of men, this may be shown; and when the proof is clear, the use of the word in that region, or among those men, carries into the contract the signification thus established. The general rule is clear, and hardly calls for a quotation of books, *vide* Cowen & Hill's Notes to 1 Phil. Ev. 1409, 1412, and the cases there cited; and if a word of known general signification may be thus qualified, it is difficult to perceive how, without a violation of the very principle on which this is allowed, we can refuse the same sort of testimony to clear up a doubtful word. The latter would seem to be a less violent exception to the rule, which requires that language shall have an effect according to its general import.

It is supposed that a patent ambiguity is more stubborn than a direct and clear expression. This conclusion is sought to be derived from the famous rule of Lord Bacon, which declares patent ambiguities unexplainable. I had occasion in a late case, *Fish v. Hubbard's Adm'rs*, 21 Wend. 651, to show that the rule in its general sense had seldom, if ever, been acted upon, and never should be so applied as to preclude collateral circumstances in explanation of doubtful words or phrases, which, when explained, are found to be significant and operative of themselves. This was also sufficiently shown in *Colpoys v. Colpoys*, Jacob, 451. Usage is one of the most common circumstances receivable for the purpose of such explanation. It is from this that we derive our general knowledge of language, which knowledge cannot be made the only test, without assuming judges and jurors to be familiar with words and phrases applicable to every employment of life in different sections of the country, and indeed in foreign countries.

It is obviously as necessary to ascertain the provincial meaning of words, through witnesses who are acquainted with their signification, as to translate a foreign language through a sworn interpreter. Abbreviations of words are often used, generally of known import; but sometimes entirely ambiguous, not to say absolutely obscure. Such was the word *mod* in the will of Nollekens, the sculptor. But its meaning was collected through the medium of witnesses skilled in the trade of the testator, and from proof of the surrounding circumstances. In that case, too, direct evidence of intention, viz., the declarations of the testator of what he intended to bequeath, and to whom, made by him to his female attendant in his sickness, was overruled. *Goblet v. Beechey*, 3 Sim. 24, more fully reported in Wigr. on Extr. Ev. 139, *et seq.*; and see *Hite v. The State*, 9 Yerg. 357, 381.

The motion to set aside the nonsuit, and for a new trial, is denied.

The New York statute as to negotiable notes is as follows: "All notes in writing, made and signed by any person whereby he shall promise to pay to any other person, or his order, or to the order of any other person, or unto the bearer, any sum of *money* therein mentioned, shall be due and payable as therein expressed; and shall have the same effect, and be negotiable in like manner as inland bills of exchange, according to the custom of merchants." 1 Rev. L. of 1813, 151; 1 Rev. St. 768, § 1. This is substantially the statute of Anne, which has been generally adopted in this country. Under this statute it is held that negotiability, as between the original parties, is not necessary to a promissory note. *Burchell v. Slocock*, 2 Ld. Raym. 1545; *Smith v. Kendall*, 6 Term, 123; *Kimball v. Huntington*, 10 Wend. 675; *Middlesex, &c. v. Davis*, 3 Met. 133. But see *Bristol v. Warner*, 19 Conn. 7, for the rule in Connecticut. And negotiability is not essential to bills of exchange. *Coursin v. Ledlie*, 31 Penn. State, 506. See also *Gerard v. Le Coste*, 1 Dallas, 194; 1 American Leading Cases, 302, and note; *Hoyt v. Lynch*, 2 Sandf. 328.

A check drawn in New York, payable in Mississippi, in current bank-notes, is not negotiable. *Little v. Phoenix Bank*, 7 Hill, 359, affirming 2 Hill, 425.

It has generally been held, that instruments payable in current bank-notes are not negotiable, though possessing all other requisites to negotiability. *Simpson v. Moulden*, 3 Cold. 429; *McDowell v. Keller*, 4 Cold. 258; *Gray v. Donahoe*, 4 Watts, 400; *Hasbrook v. Palmer*, 2 McLean, 10; *Ogden v. Slade*, 1 Texas, 13; *Irvine v. Lowry*, 14 Peters, 293; *Collins v. Lincoln*, 11 Vt. 268; *Farwell v. Kennett*, 7 Mo. 595; *Graham v. Adams*, 5 Ark. (Pike) 261. In the last-named case it was held that a note or bond payable "in good current money of the State," was payable in gold and silver. And *Cockerill v. Kirkpatrick*, 9 Mo. 688, was to the same effect. In *Hawkins v. Watkins*, 5 Ark. (Pike) 481, it was held that a draft payable "in Arkansas money of the Fayetteville Branch," was not a bill of exchange.

But a different doctrine has been held in the following cases: *Swetland v. Creigh*, 15 Ohio, 118, in which a note payable "in current Ohio bank-notes," was held negotiable, *Reed, J.*, dissenting. The same Judge dissented again in *White v. Richmond*, 16 Ohio, 5, in which a note payable "in current funds of the State of Ohio," was held negotiable; *Butler v. Paine*, 8 Minn. 324, where it was held that an order payable in "currency" was payable in money.

The mere mention of a particular fund in a bill of exchange will not vitiate it, if it was inserted only as a direction to the drawee how to reimburse himself. *Kelley v. Brooklyn*, 4 Hill, 263.

In Vermont, a contract in the form of a promissory note, payable in specific articles, is treated as a promissory note for some purposes. *Denison v. Tyson*, 17 Vt. 549; *Dewey v. Washburn*, 12 Vt. 580; *Brooks v. Page*, 1 D. Chip. 340.

As in regard to pleading and importing consideration, but not as to negotiability; as a note payable in "current bills" is not negotiable. *Collins v. Lincoln*, 11 Vt. 268. See also *Farmers' Ins. Co. v. Miller*, 26 Vt. 77, as to premium notes being promissory notes for the full amount expressed therein.

See further upon the subject of instruments payable in specific articles, *Jerome v. Whitney*, 7 Johns. 321; *Lawrence v. Dougherty*, 5 Yerg. 435; *Simpson v. Moulden*, 3 Cold. 429; *Alexander v. Oakes*, 2 Dev. & B. 513; *Martin v. Chauntry*, 2 Stra. 1271; *Dennett v. Goodwin*, 32 Maine, 44; *Atkinson v. Manks*, 1 Cowen, 691; *Barnes v. Gorman*, 9 Rich. Law, 297, and other cases cited in this and the following notes.

WORDEN v. DODGE *et al.*

(4 Denio, 159. Supreme Court of New York, January, 1847.)

Payable out of a particular fund. — An instrument by which a party promises to pay a certain sum at a stated time out of the net proceeds of ore to be raised and sold from a certain ore bed, is not a promissory note, it being payable upon a contingency.

ASSUMPSIT upon a written instrument in the form of a promissory note, except that it was payable "out of the net proceeds after paying the costs and expenses of ore to be raised and sold from the bed in the lot this day conveyed by Edward Malden to Edwin Dodge, which bed is to be opened, and the ore disposed of as soon as conveniently may be."

BEARDSLEY, J. The nonsuit was proper. A promissory note must be payable absolutely, and not upon any contingency as to time or event. 3 Kent, 5th ed. p. 74; Smith on Merc. Law, 113, 116; Story on Prom. Notes, §§ 1, 22–26; id. on Bills of Exch. §§ 46, 47; Chit. on Bills, 10th Amer. ed. pp. 132–139.

This was not such an engagement, for although the promise was to make payments at certain specified times, the payments were to be made "out of the net proceeds" "of ore to be raised and sold" from a certain ore bed. Here was a contingency; the fund might turn out to be inadequate, in which case there would be no obligation to pay at any time. It was not a promise to pay "absolutely and at all events," as a promissory note always is.

New trial denied.

That an order or promise to pay out of a particular fund is not a bill of exchange or promissory note see *Morton v. Naylor*, 1 Hill, 583; *Josselyn v. Lacier*, 10 Mod. 294; *Gallery v. Prindle*, 14 Barb. 186; *Jenney v. Herle*, 2 Ld. Raym. 1361; *Dawkes v. De Lorane*, 3 Wilson, 207; *Bayerque v. San Francisco*, 1 McAll. 175. If, however, the mention of a particular fund was inserted merely as a direction to the drawee how to reimburse himself, the instrument will not be vitiated as a bill of exchange. *Kelley v. Brooklyn*, 4 Hill, 263.

Acceptance of an order to pay a certain sum out of the first money of the drawer, received by the drawee from a particular source, will bind the acceptor to pay as the funds come to the hand of the drawee. *Perry v. Harrington*, 2 Met. 368; and note to *Newhall v. Clark*, *post*.

See, also, *Cota v. Buck*, 7 Met. 588, cited at length in note to *Kelley v. Hemingway*, *post*, 11.

COOK v. SATTERLEE and SATTERLEE.

(6 Cowen, 108. Supreme Court of New York, August, 1826.)

Additional directions. — An order directed to the defendants to pay to the plaintiff, or bearer, ninety days after date, \$400; "and take up their note given to William and Henry B. Cook for that amount," is not a bill of exchange, though accepted by the defendants.

ASSUMPSIT against the defendants, as acceptors of a bill of exchange, requesting them to pay the plaintiff \$400 ninety days after date; "and to take up their note given to William and Henry B. Cook for that amount, dated April 19, 1825."

The question in the case was whether the instrument were a bill of exchange.

SAVAGE, C. J. The essential qualities of a bill or note, are : 1. That it be payable at all events; not dependent on any contingency, nor payable out of a particular fund; and 2. That

it be for the payment of money only, and not for the performance of some other act, or in the alternative. (Chit. on Bills, 55).

Is not the instrument declared on payable upon a contingency? From the face of the instrument itself, it appears that the drawers had, on the 19th of April preceeding its date, given their note for \$400, to William and H. B. Cook; and the object of drawing the instrument in question was to take up that note. The engagement of the acceptors must be construed according to what is required of them by the drawers. The note was supposed to be in possession of the payee or holder of the bill, and the payment of the money and taking up the note of the drawers, must be simultaneous acts. The acceptors could not take up the note till it was presented; nor were they bound to pay the money till the plaintiff was ready, and offered to enable them to take up the note. It seems to me, therefore, that substantially this instrument is payable upon a contingency, and is the same as if it had said, "Pay W. C. \$400, on his giving up our note," &c. Had such been the form, it would clearly not be technically a bill of exchange. The holder, in declaring upon it, should aver his readiness to deliver up the note. Upon a contrary doctrine, the defendants may be compelled to pay the bill, and the drawers to pay the note, provided it has been transferred before due.

The defendants are entitled to judgment, with leave to amend on the usual terms.

Rule accordingly.

To the same effect on very similar facts, is *Austin v. Burns*, 16 Barb. 643.

So an instrument in the usual form of a promissory note, to which is added an authority to any attorney to enter judgment in favor of the holder for the amount of the note with costs, coupled with a release of errors and a waiver of stay of execution and of the right of an inquisition and an appraisement, is not a promissory note, so as to be entitled to days of grace. *Overton v. Tyler*, 3 Penn. State, 346.

A promissory note, however, does not lose its character as such, by a recital in the instrument that bonds have been deposited as collateral security for the note, and that they may be sold in case of non-payment. *Arnold v. Rock River, &c., R. Co.*, 5 Duer, 207.

So a written promise to pay and to do some other act required by law, as a promise to pay the hire of slaves and clothe them, is a negotiable instrument. *Baxter v. Stewart*, 4 Sneed, 213.

An instrument by which the maker promises to pay *with current exchange*, has been held a promissory note. *Smith v. Kendall*, 9 Mich. 211; *Leggett v. Jones*,

10 Wis. 34. In the former case Campbell, J., dissenting, said: "In the case of Pollard v. Herries, 3 Bos. & Pul. 335, the action being between the immediate parties to the note, no question arose concerning its negotiable character; and there is no English case that I am aware of, which has given any countenance to innovation on this subject. So far as any practice has existed in this State, in relation to notes payable with exchange, I believe it has not been in favor of their negotiability. The question has been raised several times in the Federal Court within my own experience, and every case I have known has held them not to possess that character." The cases referred to by Judge Campbell do not seem to have been reported. Grutacap v. Woullouise, 2 McLean, 581, the only Michigan case bearing on the subject in the Federal Court, was an action on a note payable with exchange. But the question was not raised whether this vitiated it as a promissory note; the question was whether exchange could be recovered, and it was held that it could be. See also Price v. Teal, 4 McLean, 201.

If the instrument recite that the payee is to receive a certain sum less than the principal sum named, in case the paper is paid on an earlier day than that named, it is not a promissory note. Fralick v. Norton, 2 Mich. 130.

A written promise to pay S., or order, \$1000, or, upon surrender of "this note," to issue stock for the same, is held a promissory note. Hodges v. Shuler, 24 Barb. 68. It was held in this case, that, as it was optional with the holder to take the stock, there was no condition and no uncertainty in the promise to pay money. Another reason is stated, that, as the instrument purported on its face to be negotiable, being payable "to order," and using the expression "this note," the payee and indorser, who was the defendant, was estopped to deny the negotiability of the paper.

In Leonard v. Mason, 1 Wend. 522, the plaintiff held a promissory note against one Leonard, underneath which was written an order in these words: "Levi Mason, Esq., please pay the above note, and hold it against me in our settlement. N. Leonard." A parol acceptance was proved, and the Court held the order a bill of exchange.

So an order drawn underneath an account directing the drawee to pay the amount of the same, is a bill of exchange, though not negotiable. Hoyt v. Lynch, 2 Sandf. 328.

Nor will it vitiate the instrument as a promissory note, that the consideration for which it was given is stated in it. Beardslee v. Horton, 3 Mich. 560.

But an instrument by which a party promises to pay a certain sum "and also all other sums which may be due," is too indefinite to constitute a promissory note. Smith v. Nightingale, 2 Stark. 375; by Lord Ellenborough, in 1818.

So an instrument promising to pay to the representatives of S., three months after his death, "first deducting thereout any interest or money which S. might owe the maker on any account," is not a note for the payment of a certain sum at all events. Barlow v. Broadhurst, 4 Moore, 471 (1820).

DAVID KELLEY, Appellant, v. MOSES HEMMINGWAY, Appellee.

(13 Illinois, 604. Supreme Court, June, 1852.)

Certainty as to time of payment. — A writing promising to pay a certain sum when K. shall arrive at age, is not a promissory note, being payable upon a contingency which may never happen; and it does not alter the case that K. actually lived to attain his majority.

THE case is stated in the opinion of the Court.

TREAT, C. J. This was an action brought by Hemmingway against Kelley before a justice of the peace, and taken by appeal to the Circuit Court. On the trial in the latter Court, the plaintiff offered in evidence an instrument in these words: —

“CASTLETON, April 27th, 1844.

“Due Henry D. Kelley, fifty-three dollars when he is twenty-one years old, with interest. DAVID KELLEY.”

On the back of which was this indorsement: —

“ROCKTON, May the 21st, 1849.

“Signed the within, payable to Moses Hemmingway. HENRY KELLEY.”

The plaintiff proved that the payee became of age in August, 1849. The defendant objected to the introduction of the instrument, because it was not negotiable, but the Court admitted it in evidence, and rendered judgment for the plaintiff.

Our statute makes promissory notes assignable by indorsement in writing, so as absolutely to vest the legal interest in the assignee. Was the instrument in question a promissory note? To constitute a promissory note, the money must be certainly payable, not dependent on any contingency, either as to event, or the fund out of which payment is to be made, or the parties by or to whom payment is to be made. If the terms of an instrument leave it uncertain whether the money will ever become payable, it cannot be considered as a promissory note. Chitty on Bills, 134. Thus, a promise in writing to pay a sum of money when a particular person shall be married, is not a promissory note, because it is not

certain that he will ever be married. *Pearson v. Garret*, 4 Mod. 242; *Beardsley v. Baldwin*, 2 Strange, 1151. So of a promise to pay when a particular ship shall return from sea, for it is not certain that she will ever return. *Palmer v. Pratt*, 2 Bing. 185; *Coolidge v. Ruggles*, 15 Mass. 387. In all such cases, the promise is to pay on a contingency that may never happen. But if the event on which the money is to become payable must inevitably take place, it is a matter of no importance how long the payment may be suspended. A promise to pay a sum of money on the death of a particular individual, is a good promissory note, for the event on which the payment is made to depend will certainly transpire. *Colehan v. Cooke*, Willes, 393; s. c., 2 Strange, 1217.

In this case, the payment was to be made when the payee should attain his majority, — an event that might or might not take place. The contingency might never happen, and therefore the money was not certainly and at all events payable. The instrument lacked one of the essential ingredients of a promissory note, and consequently was not negotiable under the statute. The fact that the payee lived till he was twenty-one years of age makes no difference. It was not a promissory note when made, and it could not become such by matter *ex post facto*. The plaintiff has not the legal title to the instrument. If it presents a cause of action against the maker, the suit must be brought in the name of the payee. The case of *Goss v. Nelson* (1 Burr. 226), is clearly distinguishable from the present. There, the note was made payable to an infant when he should arrive at age, and the day when that was to be was specified. The Court held the instrument to be a good promissory note, but expressly on the ground that the money was at all events payable on the day named, whether the payee should live till that time, or die in the interim; and it was distinctly intimated that the case would be very different had the day not been stated in the note. It was regarded as an absolute promise to pay on the day specified, and no effect was given to the words that the payee would then become of age.

The judgment must be reversed.

Judgment reversed.

When no time of payment is fixed, the presumption is that the bill or note is payable on demand. *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 20. In the case of a note payable "when demanded," the statute of limitations begins to run from the date of the note; and there is no distinction between such a note and one on demand. *Kingsbury v. Butler*, 4 Vt. 458.

"Against the 25th of December, 1819, or when the house John Mayfield has undertaken to build for me is completed, I promise to pay," &c. *Held*, that by the first clause the parties had fixed upon a certain time of payment, constituting the instrument a promissory note. *Goodloe v. Taylor*, 3 Hawks, 458. See also *Stevens v. Blunt*, 7 Mass. 240.

"For value received I promise to pay J. P., or bearer, \$570, it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said P., which is to be paid in the course of the season now coming." *Held*, that the note was payable at all events, and within a certain time. *Cota v. Buck*, 7 Met. 588. "We think the meaning to be this: that the signer, for value received in the purchase of property, promised to pay P. or bearer the sum named as soon as the termination of the coming season, and sooner, if the amount could be sooner realized out of the fund. Such reference to the sale of the property, was not to fix the fund from which it was to be paid, but the time of payment. The undertaking was absolute, and did not depend on the fund." *Ibid.* Per *Shaw*, C. J.

A note payable "twenty-four after date" was held, in *Conner v. Routh*, 7 How. (Miss.) 176, not void for uncertainty, nor a note on demand, but payable at some time after date. The note, with other evidence, was held admissible to show that the time of payment was intended to be twenty-four months from date.

In *Ubsdell v. Cunningham*, 22 Mo. (1 Jones) 124, it was held that the following were promissory notes: "Due U. & P. \$100, to be paid over to them as soon as collected at P., now in the hands of P., of that place;" and "Due U. & P. \$34.63, for goods purchased of them while at P., to be paid as soon as collected from my accounts at P." There are, however, no authorities cited in support of the decision, and it is very doubtful if any can be found, though it has been held in England that it is sufficiently certain that the paper is made payable on the payment of money due for wages on shipboard from the Government. *Andrews v. Franklin*, 1 Stra. 24; *Evans v. Underwood*, 1 Wil. 262. The ground taken seems to have been that the Government was certain to pay at some time.

In *Ellis v. Mason*, 7 Dowl. P. C. 598, the following was held a promissory note: "John Mason, 14th February, 1836, borrowed of Mary Ann Mason, his sister, the sum of £11, in cash, as per loan, in promise of payment of which I am truly thankful for; it shall never be forgotten by me, John Mason, your affectionate brother. £11."

No question was raised in this case as to the time of payment, and it may have been tacitly considered a promise to pay on demand. It would be difficult to sustain the case on any other hypothesis.

So a writing promising to pay "in such manner and proportion, and at such time and place," as the payee shall require, is a promissory note; being payable in instalments, in effect on demand, at the election of the payee. *Goshen and M. Turnpike v. Hurin*, 9 Johns. 217; *Washington Co. Mut. Ins. Co. v. Miller*, 26 Vt. 77.

But if the writing is payable "by instalments for rent," without further qualification, it has been held not to possess the requisites of a promissory note, in not specifying a certain time of payment. *Moffat v. Edwards*, Car. & M. 16.

If, in this case, the time when the instalments were payable had been stipulated, the instrument would probably have been held a promissory note, as the time of payment would thus have been made certain.

See, also, respecting time of payment, *Loring v. Gurney*, 5 Pick. 15; *Hobart v. Dodge*, 1 Fairf. 156; *De Forest v. Frary*, 6 Cowen, 151; *Harrell v. Marston*, 7 Rob. La. 34; *Salinas v. Wright*, 11 Texas, 572; *Clayton v. Gosling*, 5 Barn. & C. 360; *Ex parte Tootell*, 4 Ves. 372.

In addition to the requisites to a valid promissory note or bill of exchange, stated in the preceding cases and notes, the following are important:—

The amount must be definite and certain. See *Cushman v. Haynes*, 20 Pick. 132; *Philadelphia Bank v. Newkirk*, 2 Miles, 442; *Legro v. Staples*, 16 Maine, 252; *Jones v. Simpson*, 2 Barn. & C. 318; *Clark v. Percival*, 2 Barn. & Ad. 660; *Smith v. Nightingale*, 2 Stark. 375; *Ayrey v. Fearnside*, 4 Mees. & W. 168.

There must be certainty as to the parties, as the maker of a note. *Ferris v. Bond*, 4 Barn. & Ald. 679; *Clason v. Bailey*, 14 Johns. 484. The payee of a note or bill when not payable to bearer, *Storm v. Sterling*, 3 El. & B. 832. The drawer and drawee of a bill, *Peto v. Reynolds*, 9 Exch. 410.

But the initials of the maker were held sufficient in *Palmer v. Stephens*, 1 Denio, 471. So of an indorser: *Merchants' Bank v. Spicer*, 6 Wend. 443.

The result of the cases upon the form and requisites of bills of exchange and promissory notes, may be concisely stated thus: A bill of exchange is a written and signed order or request, and a promissory note a written and signed promise, for the payment to a person named, or to his order, or to bearer, of a definite sum in money, that is, legal tender, without condition or contingency, and at a definite time. And each should be dated, though this is not absolutely necessary. Chitty, Bills, 148.

MAKER'S LIABILITY.

WILLIAM WALLACE, Plaintiff in Error, v. CORRY M'CONNELL,
Defendant in Error.

(13 Peters, 136. Supreme Court of the United States, January, 1839.)

Note payable at particular place. No demand necessary upon maker.—In an action against the maker of a note payable at a designated place, no demand need be averred and proved; if the maker was ready and offered, at the time and place, to pay, it is a matter of defence to be pleaded and proved by him.

THE case is stated in the opinion of the Court.

THOMPSON, J. This case comes up on a writ of error from the District Court of the United States for the Southern District of Alabama.

The action in the Court below was founded upon a note, which, although under seal, is considered in Tennessee a promissory note, and is in the words following:—

“Three years and two months after date, I promise to pay Corry M'Connell or order, at the office of discount and deposit of the Bank of the United States, at Nashville, four thousand eight hundred and eighty dollars, ninety-nine cents, value received.” The declaration sets out this note according to its terms, and alleges the promise to pay at the office of discount and deposit of the Bank of the United States, at Nashville, without averring that the note was presented at the bank or demand of payment made there. The defendant pleaded payment and satisfaction of the note; and issue being joined thereupon, the cause was continued until the next term thereafter, at which time the defendant interposed a plea *pais darrein continuance*, alleging that the plaintiff, as to the sum \$4204, part and parcel of the sum demanded in the declaration, ought not further to have and maintain his action therefor against him, because that sum had been attached by Blocker and Co., by proceedings commenced by them against the plaintiff in this cause,

under the attachment law of Alabama, in which he was summoned as garnishee; and setting out the proceedings against him according to the requirements of that law, and under which he was examined on oath; and did declare, that he executed the note to the said M'Connell, the plaintiff in this cause, as set out in the declaration; that he had paid on the note \$372.34, and that the remainder of the said note was due by him to said M'Connell. And the plea further sets out, that, under the proceedings on the attachment, the Court had given judgment against him for \$4204, and costs; but with a stay of all further proceedings until the further disposition of the case, and which remains yet undetermined.

To this plea the plaintiff demurred. And the Court sustained the demurrer, and gave judgment for the plaintiff for \$675.39, the residue of the plaintiff's debt in his declaration mentioned, by default; and thereupon gave a final judgment for the plaintiff for the full amount of the note, \$4880, the debt aforesaid, and \$394, the interest assessed by the clerk together with his cost. And the plaintiff remits upon the record the sum of \$351.28; and the questions arising upon this record have been made and argued under the following objections: —

1. That the declaration is bad for want of an averment that the note was presented, and payment demanded at the office of discount and deposit of the Bank of the United States, at Nashville.

2. That the matters pleaded of the proceedings under the attachment laws of Alabama, were sufficient to bar the action, as to the amount of the sum so attached; and that the demurrer ought therefore to have been overruled.

3. That the judgment by *nil dicit*, for the \$675.39, was erroneous.

The question raised as to the sufficiency of the declaration in a case where the suit is by the payee against the maker of a promissory note, never has received the direct decision of this Court. In the case of the Bank of the United States *v.* Smith, 11 Wheat. 171, the note upon which the action was founded was made payable at the office of discount and deposit of the Bank of the United States, in the city of Washington; and the suit was against the indorser, and the question turned upon the sufficiency of the averment in the declaration of a demand of payment of the maker. And the Court said, when in the body of a note, the place

of payment is designated, the indorser has a right to presume that the maker has provided funds at such place to pay the note; and has a right to require the holder to apply at such place for payment. In the opinion delivered in that case, the question now presented in the case before us is stated; and it said, whether where the suit is against the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, it is necessary to aver a demand of payment at such place, and upon the trial to prove such demand; is a question upon which conflicting opinions have been entertained in the courts in Westminster Hall. But that the question in such case may, perhaps, be considered at rest in England, by the decision of the late case of *Rowe v. Young*, 2 Brod. & Bing. 165, in the House of Lords; where it was held, that if a bill of exchange be accepted, payable at a particular place, the declaration on such bill, against the acceptor, must aver presentment at that place, and the averment must be proved. But it is there said a contrary opinion has been entertained by courts in this country; that a demand on the maker of a note, or the acceptor of a bill payable at a specified place, need not be averred in the declaration or proved on the trial; that it is not a condition precedent to the plaintiff's right of recovery. As matter of practice, application will generally be made at the place appointed, if it is believed that funds have been there placed to meet the note or bill. But if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment, at the place appointed, it is matter of defence to set up by plea and proof. But it is added, as this question does not necessarily arise in this case, we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to think, that as against the maker of a note or the acceptor of a bill, no averment or proof of a demand of payment at the place designated would be necessary. The question now before the Court cannot, certainly, be considered as decided by the case of the *Bank of the United States v. Smith*, 11 Wheat. 171. But it cannot be viewed as the mere obiter opinion of the judge who delivered the judgment of the court. The attention of the Court was drawn to the question now before the Court, and the remarks made upon it, and the authorities referred to, show that this Court was fully apprised of the conflicting opinions of the English courts on the question; and that opinions, contrary

to that of the House of Lords, in the case of *Rowe v. Young*, 2 Brod. & Bing. 165, had been entertained by some of the courts in this country ; and under this view of the question, the Court say they are strongly inclined to adopt the American decisions. As the precise question is now presented by this record, it becomes necessary to dispose of it.

It is not deemed necessary to go into a critical examination of the English authorities upon this point ; a reference to the case in the House of Lords, which was decided in the year 1820, shows the great diversity of opinion entertained by the English judges upon this question. It was, however, decided that if a bill of exchange is accepted, payable at a particular place, the declaration in an action on such bill against the acceptor, must aver presentment at that place, and the averment must be proved. The Lord Chancellor, in stating the question, said this was a very fit question to be brought before the House of Lords, because the state of the law, as actually administered in the courts, is such, that it would be infinitely better to settle it in any way than to permit so controversial a state to exist any longer. That the Court of King's Bench has been of late years in the habit of holding that such an acceptance as this is a general acceptance ; and that it is not necessary to notice it as such in the declaration, or to prove presentment, but that it must be considered as matter of defence ; and that the defendant must state himself ready to pay at the place, and bring the money into court, and so bar the action by proving the truth of that defence. On the contrary, the Court of Common Pleas was in the habit of holding, that an acceptance like this was a qualified acceptance, and that the contract of the acceptor was to pay at the place ; and that as matter of pleading a presentment at the place stipulated must be averred, and that evidence must be given to sustain that averment ; and that the holder of the bill has no cause of action unless such demand has been made. In that case the opinion of the twelve judges was taken and laid before the House of Lords, and will be found reported in an appendix to the report of the case of *Rowe v. Young*, 2 Brod. & Bing. 180. In which opinions all the cases are referred to in which the question had been drawn into discussion ; and the result appears to have been, that eight judges out of the twelve sustained the doctrine of the King's Bench on this question, notwithstanding which the judgment was reversed.

It is fairly to be inferred from an act of parliament passed immediately thereafter, 1 & 2 Geo. IV. c. 78, that this decision was not satisfactory. By that act, it is declared that "after the 1st of August, 1821, if any person shall accept a bill of exchange payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill. But if the acceptor shall, in his acceptance, express that he accepts the bill payable at a banker's house or other place only, and not otherwise or elsewhere; such acceptance shall be a qualified acceptance of such bill; and the acceptor shall not be liable to pay the bill except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place." Bayley on Bills, 200, note.

In most of the cases which have arisen in the English courts, the suit has been against the acceptor of the bill, and in some cases a distinction would seem to be made between such a case and that of a note when the action is against the maker, and the designated place is in the body of the note. But there can be no solid grounds upon which such a distinction can rest. The acceptor of a bill stands in the same relation to the drawee as the maker of a note does to the payee; and the acceptor is the principal debtor in the case of a bill, precisely like the maker of a note. The liability of the acceptor grows out of, and is to be governed by, the terms of his acceptance, and the liability of the maker of a note grows out of, and is to be governed by, the terms of his note; and the place of payment can be of no more importance in the one case than in the other. And in some of the cases where the point was made, the action was against the maker of a promissory note, and the place of payment designated in the body of the note. The case of *Nicholls v. Bowes*, 2 Camp. 498, was one of that description, decided in the year 1810; and it was contended on the trial, that the plaintiff was bound to show that the note was presented at the banking house where it was made payable. But Lord *Ellenborough*, before whom the cause was tried, not only decided that no such proof was necessary, but would not suffer such evidence to be given; although the counsel for the plaintiff said he had a witness in court to prove the note was presented at the banker's the day it became due; his lordship alleging that he was afraid to admit such evidence lest doubts should arise as to

its necessity. And in the case of *Wild v. Rennards*, 1 Camp. 425, note, Mr. Justice *Bayley*, in the year 1809, ruled that if a promissory note is made payable at a particular place, in an action against the maker, there is no necessity for proving that it was presented there for payment.

The case of *Sanderson v. Bowes*, 14 East, 500, decided in the King's Bench in the year 1811, is sometimes referred to as containing a different rule of construction of the same words when used in the body of a promissory note, from that which is given to them when used in the acceptance of a bill of exchange. But it may be well questioned whether this use warrants any such conclusion. That was an action on a promissory note by the bearer against the maker. The note, as set out in the declaration, was a promise to pay on demand at a specified place, and there was no averment that a demand of payment had been made at the place designated. To which declaration the defendant demurred; and the counsel in support of the demurrer referred to cases where the rule had been applied to acceptances on bills of exchange; but contended that the rule did not apply to a promissory note, when the place is designated in the body of the note. Lord *Ellenborough*, in the course of the argument, in answer to some cases referred to by counsel, observed: "Those are cases where money is to be paid, or something to be done at a particular time as well as place, therefore the party (defendant) may readily make an averment, that he was ready at the time and place to pay, and that the other party was not ready to receive it; but here the time of payment depends entirely on the pleasure of the holder of the note." It is true Lord *Ellenborough* did not seem to place his opinion, in the ultimate decision of the cause, upon this ground. But the other judges did not allude to the distinction taken at the bar between that case and the acceptance of a bill in like terms; but placed their opinions upon the terms of the note itself, being a promise to pay on demand at a particular place. And there is certainly a manifest distinction between a promise to pay on demand, at a given place, and a promise to pay at a fixed time at such place. And it is hardly to be presumed that Lord *Ellenborough* intended to rest his judgment upon a distinction between a promissory note and a bill of exchange, as both he and Mr. Justice *Bayley* had a very short time before, in the cases of *Nicholls v. Bowes*, 2 Camp. 498, and *Wild v. Rennards*, 1 Camp. 425, note, above referred to,

applied the same rule of construction to promissory notes where the promise was contained in the body of the note. Where the promise is to pay on demand at a particular place, there is no cause of action until the demand is made, and the maker of the note cannot discharge himself by an offer of payment, the note not being due until demanded.

Thus we see that until the late decision in the House of Lords in the case of *Rowe v. Young*, and the act of parliament passed soon thereafter, this question was in a very unsettled state in the English courts ; and without undertaking to decide between those conflicting opinions, it may be well to look at the light in which this question has been viewed in the courts in this country.

This question came before the Supreme Court of the State of New York, in the year 1809, in the case of *Foden and Slater v. Sharp*, 4 Johns. 183, and the Court said the holder of a bill of exchange need not show a demand of payment of the acceptor any more than of the maker of a note. It is the business of the acceptor to show that he was ready at the day and place appointed, but that no one came to receive the money, and that he was always ready afterwards to pay. This case shows that the acceptor of a bill and the maker of a note were considered as standing on the same footing with respect to a demand of payment at the place designated. And in the case of *Wolcott v. Van Santvoord*, 17 Johns. 248, which came before the same court in the year 1819, the same question arose. The action was against the acceptor of a bill, payable five months after date at the Bank of Utica, and the declaration contained no averment of a demand at the Bank of Utica, and upon a demurrer to the declaration the Court gave judgment for the plaintiff. Chief Justice *Spencer*, in delivering the opinion of the Court, observed, that the question had been already decided in the case of *Foden v. Sharp* ; but considering the great diversity of opinion among the judges in the English courts on the question, he took occasion critically to review the cases which had come before those courts, and shows very satisfactorily that the weight of authority is in conformity to that decision, and the demurrer was accordingly overruled ; and the law in that State for the last thirty years has been considered as settled upon this point. And although the action was against the acceptor of a bill of exchange, it is very evident that this circumstance had no influence upon the decision ; for the Court say that

in this respect the acceptor stands in the same relation to the payee as the maker of a note does to the indorsee. He is the principal, and not a collateral debtor.

And in the case of *Caldwell v. Cassady*, 8 Cowen, 271, decided in the same court in the year 1828, the suit was upon a promissory note payable sixty days after date at the Franklin Bank in New York, and the note had not been presented or payment demanded at the bank ; the Court said, this case has been already decided by this court in the case of *Wolcott v. Van Santvoort*. And after noticing some of the cases in the English courts, and alluding to the confusion that seemed to exist there upon the question, they add : "That whatever be the rule in other courts, the rule in this court must be considered settled, that where a promissory note is made payable at a particular place on a day certain, the holder of the note is not bound to make a demand at the time and place by way of a condition precedent to the bringing of an action against the maker. But if the maker was ready to pay at the time and place, he may plead it as he would plead a tender in bar of damages and costs by bringing the money into court."

It is not deemed necessary to notice very much at length the various cases that have arisen in the American courts upon this question ; but barely to refer to such as have fallen under the observation of the Court ; and we briefly state the point and the decision thereupon ; and the result will show a uniform course of adjudication, that in actions on promissory notes against the maker, or on bills of exchange, where the suit is against the maker in the one case, and acceptor in the other, and the note or bill made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made in order to maintain the action. But that if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it was matter of defence to be pleaded and proved on his part.

The case of *Watkins v. Crouch & Co.*, in the Court of Appeals of Virginia, 5 Leigh, 522, was a suit against the maker and indorser, jointly, as is the course in that State upon a promissory note like the one in suit. The note was made payable at a specified time, at the Farmers' Bank, at Richmond, and the Court of Appeals, in the year 1834, decided that it was not necessary to aver and prove a presentation at the bank and demand of pay-

ment, in order to entitle the plaintiff to recover against the maker ; but that it was necessary, in order to entitle him, to recover against the indorser ; and the president of the Court went into a very elaborate consideration of the decisions of the English courts upon the question ; and to show that, upon common-law principles, applicable to bonds, notes, and other contracts for the payment of money, no previous demand was necessary in order to sustain the action, but that a tender and readiness to pay must come by way of defence from the defendant ; and that, looking upon the note as commercial paper, the principles of the common law were clearly against the necessity of such demand and proof, where the time and place were specified, though it would be otherwise where the place, but not the time, was specified ; a demand in such case ought to be made ; and he examined the case of *Sanderson v. Bowes*, to show that it turned upon that distinction ; the note being payable on demand at a specified place. The same doctrine was held by the Court of Appeals of Maryland, in the case of *Bowie v. Duvall*, 1 Gill & Johnson, 175 ; and the New York cases, as well as that of the Bank of the United States *v. Smith*, 11 Wheat. 171, are cited with approbation, and fully adopted : and the Court put the case upon the broad ground that, when the suit is against the maker of a promissory note, payable at a specified time and place, no demand is necessary to be averred, upon the principle that the money to be paid is a debt from the defendant, that it is due generally and universally, and will continue due, though there be a neglect on the part of the creditor to attend at the time and place to receive or demand it. That it is matter of defence, on the part of the defendant, to show that he was in attendance to pay, but that the plaintiff was not there to receive it ; which defence generally will be in bar of damages only, and not in bar of the debt. The case of *Ruggles v. Patten*, 8 Mass. 480, sanctions the same rule of construction. The action was on a promissory note for the payment of money, at a day and place specified ; and the defendant pleaded that he was present at the time and place, and ready and willing to pay, according to the tenor of his promises, in the second count of the declaration mentioned, and avers that the plaintiff was not then ready or present at the bank to receive payment, and did not demand the same of the defendant, as the plaintiff in his declaration had alleged ; the Court said this was an immaterial issue, and no bar to an action or promise to pay money.

So, also, in the State of New Jersey, the same rule is adopted. In the case of *Weed v. Van Houten*, 4 Halst. (N.J.) 189, the Chief Justice says: "The question is, whether, in an action by the payee of a promissory note, payable at a particular place, and not on demand, but at time, it is necessary to aver a presentment of the note and demand of payment by the holder at that place, at the maturity of the note." And, upon this question, he says: "I have no hesitation in expressing my entire concurrence in the American decisions, so far as is necessary for the present occasion; that a special averment of presentment at the place is not necessary to the validity of the declaration, nor is proof of it necessary upon the trial. This rule, I am satisfied, is most conformable to sound reason, most conducive to public convenience, best supported by the general principles and doctrines of the law, and most assimilated to the decisions, which bear analogy more or less directly to the subject."

The same rule has been fully established by the Supreme Court of Tennessee, in the cases of *M'Nairy v. Bell*, and *Mulherrin v. Hannum*, 1 Yerg. 502, and 2 Yerg. 81, and the rule sustained and enforced upon the same principles and course of reasoning upon which the other cases referred to have been placed. And no case, in an American court, has fallen under our notice, where a contrary doctrine has been asserted and maintained. And it is to be observed, that most of the cases which have arisen in this country, where this question has been drawn into discussion, were upon promissory notes, where the place of payment was, of course, in the body of the note. After such a uniform course of decisions for at least thirty years, it would be inexpedient to change the rule, even if the grounds upon which it was originally established, might be questionable; which, however, we do not mean to intimate. It is of the utmost importance that all rules relating to commercial law should be stable and uniform. They are adopted for practical purposes, to regulate the course of business in commercial transactions; and the rule here established is well calculated for the convenience and safety of all parties.

The place of payment in a promissory note, or in an acceptance of a bill of exchange, is always matter of arrangement between the parties for their mutual accommodation, and may be stipulated in any manner that may best suit their convenience. And, when a note or bill is made payable at a bank, as is generally the case, it is well known that, according to the usual course of business, the note

or bill is lodged at the bank for collection ; and, if the maker or acceptor calls to take it up when it falls due, it will be delivered to him, and the business is closed. But, should he not find his note or bill at the bank, he can deposit his money to meet the note when presented ; and should he be afterwards prosecuted, he would be exonerated from all costs and damages, upon proving such tender and deposit. Or, should the note or bill be made payable at some place other than a bank, and no deposit could be made, or he should choose to retain his money in his own possession, an offer to pay at the time and place, would protect him against interest and costs, on bringing the money into court ; so that no practical inconvenience or hazard can result from the establishment of this rule, to the maker or acceptor. But, on the other hand, if a presentment of the note and demand of payment at the time and place, are indispensable to the right of action, the holder might hazard the entire loss of his whole debt.

See note to Newhall v. Clark, *post* ; Taylor v. Snyder, and Chicopee Bank v. Philadelphia Bank, and note, *post*, as to the rule respecting indorsers of paper payable at a place designated.

DRAWER'S LIABILITY.

THE liability of the drawer of a bill of exchange being in general that of an indorser, the subject will not be separately introduced here. The cases and notes will be found under *Presentment for ACCEPTANCE*, and *PROCEEDINGS UPON NON-PAYMENT*, *post*.

ACCEPTANCE.

S. & M. ALLEN v. SUYDAM and BOYD.

(20 Wendell, 321. Court of Errors of New York, December, 1838.)

Agent's duty to present for acceptance. — An agent who receives a bill of exchange, payable after date, for collection, which has not been accepted, is bound to present the same for acceptance without unreasonable delay, or he will be liable to his principal for the damages which the latter may sustain by the agent's negligence. In case the debt is lost by the agent's negligence, the measure of damages is *prima facie* the amount of the bill; but evidence of facts may be produced tending to reduce the recovery to a nominal sum.

ACTION on the case against S. & M. Allen for negligence in omitting for seventeen days to present for acceptance a bill of exchange sent them by Suydam and Boyd for collection, and payable two months after date.

By the CHANCELLOR. Two questions of importance to the commercial community are presented for our consideration and decision in this cause: 1. Whether an agent, or broker, who receives for collection a draft or bill of exchange payable at a particular day, or a certain number of days after its date, is under any obligation to present the same to the drawee for acceptance immediately, and before the time when the draft is due and payable? And, 2. If he is, whether the person who has given him such draft or bill for collection, can, in case of his neglect to present the same before the day of payment, recover the whole amount due thereon, with interest; although the owner has not, in fact, sustained damage to that extent, by the neglect of his broker or agent to present the bill for acceptance without any unnecessary delay?

A bill payable *at sight*, or a certain number of days *after sight*, must be presented for acceptance and payment, or for acceptance only, without unreasonable delay, or the drawer and indorsers will be discharged, for they have an interest in having the bill accepted immediately, in order to shorten the time of payment, and thus to

put a limit to the period of their liability; and also, to enable them to protect themselves by other means, before it is too late, if the bill is not accepted and paid within the time originally contemplated by them. But in relation to a bill payable *at a day certain*, as at a fixed time after its date, it is perfectly well settled, not only in this country and in England, but also in Scotland and in France, that the drawer or indorser of the bill is not discharged by the neglect of the holder to present the same for acceptance immediately, or until the time when it becomes due and payable. If, however, such a bill is actually presented for acceptance, and is dishonored before it becomes due, notice of such dishonor must be given to the drawer or indorser without delay, or he will be discharged. 3 Kent, Comm. 2d ed. 82; Townsley v. Sumrall, 2 Peters, U. S. 170; Goodall v. Dolley, 1 Term, 712; Bayley on Bills, 212; Glen, 109; Byles, 102; Evans, 80; Muir, 22; 2 Pardessus, No. 358, p. 417, 2d Paris ed. All the writers agree, however, that the *owner* of the bill has an interest in having it presented for acceptance without delay, although such presentment is not necessary in the case of a bill payable on a day certain, to enable him to retain his claim against the drawer or indorser of such bill; and that if the *agent* who has been intrusted with the bill for the purpose of getting it accepted and paid, or accepted only, neglects to comply with the direction of the owner, to get the bill accepted without any unnecessary delay, he will be liable to the owner for the damage which the latter has sustained by such negligence. Pardessus says that the right to require an acceptance in such a case, is one which the holder of the bill may use or not, as he thinks proper, but that it is certainly an advantage to him to demand such acceptance; for if the drawer is in credit, the drawee will probably accept, and the holder will thus obtain an additional security for his debt; whereas, if he delays to present the bill for acceptance until it becomes due, and the drawer fails in the mean time, the drawee may then refuse to accept: and he might have added, for such is the rule of the French law on the subject, that if the bill was protested for non-acceptance before it became due, the holder would then have been entitled to demand, both of the drawer and of the indorsers, security for the payment of the bill when it should become due, or for reimbursement, with the expenses of protest and re-exchange. Pardessus also says that the bearer of the bill may hold it as a

mere agent, to do what is necessary for the interest of his principal; in which case, he ought to act according to the express or implied duties which are derived from his relation to such principal; and among the duties which his situation imposes upon the agent, is that of presenting the bill for acceptance whenever the law or prudence imposes such an obligation on him. 2 Pard. No. 358, pp. 417, 420; No. 583, p. 669. It was upon this ground that the case of *The Bank of Scotland v. Hamilton*, referred to in a note to Bell's Commentaries, and also in Chitty on Bills, was decided. And Glen, who also has a brief note of that case, states, as exceptions to the rule, that it is not necessary to present a bill, payable at a time certain, for acceptance, before it becomes due; the case of a direction to the payee or holder of the bill to present it immediately; and the case of a bill sent to an agent for negotiation. Glen on Bills, 109.

The counsel for the plaintiffs in error, however, attempted to take the case out of this last exception to the general rule, on the ground that these agents only received the bill for collection, and that they received no instructions to present it for acceptance before it came due. I infer, however, from the note of the case of *The Bank of Scotland v. Hamilton*, as given by Glen, that the present case cannot be distinguished from that in this respect. For it there appears that the bill then in question was finally presented for acceptance on the evening of the fourth day from its date, after the drawer had failed, and then only in consequence of a letter from Dunlop, who had sent the bill to the agents in Glasgow three days before. From that statement of the case, I think we may fairly presume there were no special directions to the agents to present the bill for acceptance when it was originally sent to them for collection, especially as it had but four days to run when it was originally discounted by Dunlop. On this subject, Pothier says, in regard to the indorsement of a bill by the owner thereof to another, as a *mere agent* to receive the amount due thereon for the indorser and as his proxy: "The contract which such an indorsement implies, and which it makes between the indorser and the person to whom he makes his order, is a contract of agency, and creates the ordinary obligations of an agent; and consequently, he to whom the order is given is liable in the character of an agent, as regards his indorser, the owner of the bill, to obtain acceptance if it has not already been accepted, and to go

when the bill becomes due to receive payment thereof, and remit him the amount; and also in default of acceptance or of payment, to make the protests, &c., which are necessary in such cases, and the indorser on his part is bound to make good the whole of the expenses which have been incurred therefor by the indorsee." Poth. Traite Du Cont. DeChange, c. 4, No. 82. Again: "The bearer of the bill, where he is merely the agent of the owner, ought to present it as soon as possible to the drawee to have it accepted. It is very important to have it accepted, as it is only by accepting it that the drawee becomes bound to pay it. Without such acceptance, the owner of the bill has for his debtor only the drawer of the bill, to whom he has paid its value. Therefore, if the drawer should happen to fail, the bearer of the bill who had neglected to present it for acceptance would be liable to damages, if it was his fault, in favor of the owner of the bill for whom he was agent." Id. No. 128. The principles thus laid down by Pothier are recognized by Beawes and Paley as sound and correct, in relation to the duties and liabilities of agents who are employed in negotiating or collecting bills of exchange; and I can see no good reason why they should not be applied to the case now under consideration. If the receiving a bill by an agent, to collect, implies an obligation on his part to take the necessary steps to charge the drawer and indorsers, by protest and notices, in case it is not accepted and paid by the drawee, I do not see why due diligence on the part of the agent, in procuring the acceptance of the drawee without delay, when it may be necessary or beneficial to the interests of the principal, should not also be implied, as it is the duty of a faithful agent to do for his principal whatever the principal himself would probably have done if he was a discreet and prudent man. Even where the principal is habitually negligent in attending to his own interests, it forms no excuse for similar negligence on the part of his agent. The fact, therefore, that the bill in this case was not put into the hands of the agents for collection until some time after it bore date, was no legal excuse for their negligence in not sending it on for acceptance and payment without unnecessary delay. For these reasons, I agree with the Court below, that the Allens were legally liable to the owners of this bill for the damages, if any, which the latter sustained by the non-presentment of the bill to the drawee for acceptance previous to the time it became due.

In relation to the amount of damages, however, I think the charge of the judge, who tried the cause, was clearly wrong; and that it has unquestionably produced great injustice in this case. As we have before seen, the relation between the drawer or indorser of the bill and the person to whom it is transferred for the mere purpose of negotiation or collection, is not the relation of indorser and indorsee, so as to throw the loss of the whole amount of the bill upon the latter, if he neglects to present the same for acceptance and payment in time, or to give notice of its dishonor to the indorser, as required by law. Nor will the payment of the damages, by the agent, have the effect to subrogate him to all the rights and remedies of the person from whom he received the bill, as against other parties who may be liable for the payment thereof; but it is a mere contract of agency, which leaves the indorser to all his rights and remedies for the recovery of his debt as against other parties, and only renders the indorsee liable as agent for the actual or probable damages which his principal has sustained in consequence of the negligence of such agent. This principle was distinctly recognized by the Court of King's Bench in England, in the case of *Van Wart v. Woolley*, 5 Dowl. & Ryl. 374, where the plaintiff had not lost his remedy against the drawers of the bill, or the persons from whom he received it, by reason of the neglect of the agents to present it for acceptance in due time; the drawers of the bill in that case having drawn without authority when they had no funds in the hands of the drawees, and *Irving & Co.*, who had sent the bill to the plaintiffs in payment, not standing in the situation of indorsers of the bill, as their names did not appear upon it. In that case, however, if there had been any evidence to warrant the belief that the bill would have been accepted if an immediate acceptance or rejection of the bill by the drawees had been insisted on, according to the decision in the case of *The Bank of Scotland v. Hamilton*, the loss which had arisen from the neglect of the defendant in not pressing for an acceptance, or in not giving due notice of the dishonor of the bill immediately, if it could then probably have been collected from the drawees, should have fallen upon *Woolley & Co.* instead of *Irving & Co.*, who had remitted the same to *Van Wart*; and the plaintiff would then have been permitted to recover whatever damages had been sustained by such negligence, for the benefit of *Irving & Co.* In that respect *Irving & Co.* stood in the same rela-

tive situation to Van Wart, as Dunlop did to the Bank of Scotland, in the case before referred to; and Woolley & Co. occupied the situation of Hamilton & Co., who were held liable in that case, in exoneration of Dunlop's liability. The only difference in principle which I can see between the two cases is, that in the Scotch case it was evident that the bill would probably have been accepted and saved, if it had been presented for acceptance on *Saturday*, when it was received by the agent in Glasgow, instead of being kept back until *Tuesday* evening, when news of the drawers' failure had reached that place; and therefore, to exonerate Dunlop, who remitted the bill, the agents in Glasgow were very properly charged with the amount of the bill, the whole of which had been lost through their negligence, except the small amount of dividend which the bank would be entitled to out of the drawers' estate under the commission of bankruptcy against him: whereas, in the case of Van Wart v. Woolley, there was no reason to believe that the bill would have been accepted if the agent had insisted upon an answer immediately, and there was as little probability that any thing would have been obtained from the drawers if Van Wart or Irving & Co. had received notice of the dishonor of the bill immediately after it was received by the agent in London. In the latter case, therefore, the damage which either Van Wart or those who had transmitted him the bill in payment had sustained, was merely nominal. Besides, the Supreme Court of this State having decided, that neither the drawers nor Irving & Co. were discharged from their liability to the plaintiff by this neglect of his agent, neither of them, in fact, having been injured by such neglect, the plaintiff upon the second trial was of course only held to be entitled to such damages as he had sustained, and which were nominal only. If the rule laid down by the judge who tried the present case was correct, that the principal was entitled to recover the whole amount of the bill and interest, because there was no other evidence to enable the jury to discover what the damage was, then the plaintiff in the case of Van Wart v. Woolley should have been permitted to retain his verdict upon the first trial; as it did not then appear whether he could actually succeed in collecting the money, either from the drawers of the bill, or from Irving & Co.: neither did it then appear whether by the laws of this State, where they resided, they were not actually discharged from liability, so that no judgment could be recovered against them, in conse-

quence of the negligence of the agent. The granting of the new trial in that case, therefore, proceeded upon the principle that the agent was not liable for the whole amount of the bill, unless damages to that extent had been sustained by his neglect, and that to recover damages to that extent it was incumbent upon the party claiming, to give sufficient evidence to satisfy the Court and jury that it was at least probable that he had sustained damages to that amount. Neither the Scotch or the English case, therefore, is an authority to sustain the charge of the judge in relation to the amount of damages in the present case; on the contrary, the case of *Van Wart v. Woolley* is a direct authority to show that the agent ought not to be charged with the whole amount of the bill, unless there is sufficient evidence to render it at least probable that the whole amount of the debt would have been saved if the agent had discharged the duty which his situation imposed upon him.

Where there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty; or where, by the negligence of the agent, the liability of a drawer or indorser who was apparently able to pay the bill has been discharged, so that the owner of the bill cannot legally recover against such drawer or indorser, I admit the agent by whose negligence the loss has occurred is *prima facie* liable for the whole amount thereof, with interest, as damages; unless he is able to satisfy the Court and jury that the whole amount of the bill has not been actually lost to the owner in consequence of such negligence. The case under consideration, however, is one of a very different description. Here it is perfectly evident, from the testimony of one of the drawees, that the draft would not have been accepted at any time after it was received by the Allens for collection, as the drawees had received express directions from the drawer not to accept; nor would they have accepted it, even without such a prohibition, unless they had previously been advised so to do by the drawer. The fact, also, that the drawer's credit was not good at the time this draft was received for collection, he having suffered his note to Boyd and Suydam to lie under protest for some time, and the express directions given by him to the drawees not to accept this draft, rendered it highly improbable that he would have paid the draft himself to save his credit, if it had been sent back protested at an earlier day. From the facts of the case,

therefore, I think there was no ground for supposing that the owners had sustained any actual damage from the mistake of the Allens, in not sending on the bill for acceptance immediately after they received it for collection in New York; or that their chance of obtaining payment from the drawer was materially impaired by the delay of the protest for a few days. Under the circumstances of this case, therefore, I think the jury should have been instructed that, upon the evidence, the plaintiffs were only entitled to nominal damages; or at least they should have been told to find only such damages as they should, from the evidence, believe it probable the plaintiffs might have sustained by the delay in presenting the draft for acceptance immediately; for I do not see how it is possible for any one to believe, or even to suppose it probable from this evidence, that the whole amount of this draft was in fact lost to the plaintiffs below, by the delay of the Allens in presenting it to the drawees, and giving notice of the dishonor thereof immediately to the drawer, who never intended that it should be accepted and paid.

For these reasons I am of opinion that the judgment of the Court below should be reversed, and that a *venire de novo* should be awarded; to the end that no more damages may be recovered than such as a jury may believe it probable, from the evidence adduced, that the plaintiffs may have sustained from the negligence of their agents.

By Senator VERPLANCK.¹ In this case the defendants in the Court below were agents for collecting, for a commission, a draft on another State, payable *after date*. What are the duties and responsibilities of agents in regard to presenting such paper for acceptance? Legal authority, as well as commercial usage, has long settled as a general rule, that the holder of a bill of exchange, payable at a specific time, is not obliged to present such bill for acceptance in order to hold the drawer or prior indorser. It is, indeed, usual as well as prudent, to do so, both for the sake of the added security and better credit of the paper, and because in case of refusal, recourse may be had immediately to the drawer. It is, therefore, the duty of an agent for collection, to exert the customary prudence, and present such paper for acceptance without

¹ This opinion is given as exceedingly interesting and able; though that part of it relating to the damages was not adopted.

delay, since, by neglect, his principal may either lose the drawee's security, and the credit it gives, or else be prevented from making such inquiries and demands, or using such legal or precautionary measures towards the drawer or other parties, as might tend to secure his debt. This distinction was long ago stated by Pothier, who points out the different obligations of him who holds a bill as an agent ("mandataire"), "who ought to present it for acceptance as soon as possible;" and those of him who holds as owner ("lorsque le porteur est en même temps le propriétaire"), who may present it when he thinks fit. *Contract du Change*, partie 1, c. 5, art. 128. This distinction was recognized in the English elementary books (see earlier editions of Chitty on Bills, and other writers there cited) as part of the general commercial law of Europe, before any express judicial decision to that point. The modern case of *Van Wart v. Woolley*, 5 Dowl. & Ryl. 374; 3 Barn. & Cres. 439, has sanctioned the principle judicially, by deciding that the delay of an agent to give notice of non-acceptance of bills, subjected him to damages, even when the drawer was not discharged. The case of the *Bank of Scotland v. Hamilton*, cited in 1 Bell's *Commentary on the Laws of Scotland*, 409, decided by the Scotch Court of Sessions, is remarkable for its similarity to the present case, and is entitled to the same authority with us, as it receives in England (see Chitty on Bills, 300, who refers to that case as an authority to this point), as well on account of the general uniformity of the law of negotiable paper in the civilized world, as because it is evident from the books that on this head the Scotch law conforms to the English, and is much governed by its usages and decisions. In that case, a bill payable at Glasgow, three days after date, was sent to an agent at that city for collection. It is stated "that it is not customary for *porteurs* (bearers) of bills at short dates to present them for acceptance." Before the day of payment the drawer failed, and the Glasgow Bank refused to accept. It was not clear whether the bank would have accepted the draft if it had been immediately presented, for the bank had no funds of the drawer, and the practice had been to make provisions for such drafts at the day of payment. The action was against the agents. "The Court held, that, as *agents*, they were bound immediately to present the bill for acceptance."

Thus, it seems to be the general commercial law of the civilized world, that when a bill is payable at a day certain, the drawer and indorser are not discharged if the bill is not presented until the

day of payment. Yet it is still the duty of the *agent* for collection to present the bill for acceptance without delay, and to give immediate notice of refusal to accept. The reason of this, I take to be, that the drawer, by fixing a day certain for payment, assumes the responsibility of providing funds at that time, whatever may have been his previous credit with the drawee. Again: an indorser makes, as the phrase is, "a new bill on the same terms; and besides, he waives his right of immediate acceptance, by not enforcing it, but putting his bill into circulation without acceptance." Not so he who places a bill in his agent's hands for collection. He makes no waiver or postponement of any of his rights, but looks directly to the means necessary or expedient for his own security. In the present instance, the draft, which the payees might have retained until the day of payment, had they thought fit, was placed, directly upon receiving it, in the hands of agents, who were to receive "a commission or compensation for collecting the same." It was retained for seventeen days by the agents, who could have forwarded it for acceptance the next day. Nor after it had been refused acceptance did they again present it for payment. In the delay of presentation for acceptance, there was want of due diligence. The principle is familiar, that an agent for pay is bound to use such means, care, skill, and precaution, as are adequate to the due execution of his trust. He must use the ordinary diligence of a skilful and prudent man in such affairs. • Now an early presentment for acceptance is an obvious precaution which a prudent man of business would take, to insure collection of a questionable draft. By this neglect or delay, the payees were prevented from making those demands and taking such immediate measures as to the drawer, on receipt of notice of non-acceptance, as might possibly have secured the payees in some way or other. At the late period at which they did receive such notice, they preferred looking to the responsibility of their agents. These must be held responsible for the consequences of their negligence to the amount of the damage so caused. Nor is it a sufficient defence of the agents, that the bill would not have been accepted if immediately presented, because the drawer had directed that it should not be, nor that it was uncertain whether the funds in the hands of the drawees were sufficient or not, to meet the draft at the day fixed for payment. At and after the time when the draft should have been presented, the drawer was in business at New York, struggling for and obtaining credit, and

having the command of funds which he applied to pay other drafts presented subsequently to the date, when, with due diligence, notice of the non-acceptance of this bill would have been received. Whatever might have been his first intention, it was not for a court and jury to assume the broad presumption that an immediate demand, upon return of the draft, with such other legal measures as the state of business between the parties or other circumstances might render advisable, would not have led to the ultimate payment. As a mere conjectural inference from the character and course of business of Eastabrook, as incidentally presented in the evidence, I should think the probability rather the other way, and that immediate and urgent measures might perhaps have prevented loss. His death, and the consequent insolvency of his estate, have left all this mere matter of conjecture; but it is quite immaterial as to the question of the agent's duty, and the right of action against him, though were it distinctly in evidence either way, it might affect the measure of damages.

Thus far, then, I think the law quite clear as to the rights of holders of bills, and the duties of collecting agents; but I have had more hesitation as to the rule of damages. Is the plaintiff, in similar cases, to be obliged to make out in evidence the precise actual amount of the damage he sustained, and thus to give to the party in fault all the numerous and great advantages of doubt, uncertainty, and difficulty in the proof? Or are we to apply to these cases the doctrine of laches in commercial paper, as between the holder and other parties, and consider the agent as having made the paper his own by his neglect? Contradictory as these rules are, they have yet each their share of authority, and are just and wise when applied to other questions; but I am not satisfied with the equity in the commercial policy of either, when applied to a collecting agency, and I have sought in the decisions for some safer and more equitable doctrine on that head.

Considering the subject in regard to commercial policy, there is, on one side, the vast amount of paper daily collected through our banks, the great public necessity for giving every facility and inducement to such collections, the serious drawback on those facilities and inducements that would be occasioned, and the opportunity of fraud afforded if worthless paper deposited for collection can, whenever parties are discharged by the blunder

of a clerk, be saddled irrevocably on responsible agents and "made their own" absolutely, and without allowing any defence or mitigation of damages. On the other hand, the policy of holding such agents to strict accountability is equally clear. Our whole system of negotiable paper, and its responsibilities, formed, as it is, by long experience, and admirably adjusted to the varied uses of commerce, rests upon the single principle of strict punctuality in demands, presentments, and notices, as well as in payments. Now the policy and necessity of that punctuality, apply with the same force to the agent of such paper that they do to the principal. I can, therefore, find no sounder rule of damages, nor one better protecting and reconciling all these claims of policy and justice, than that pointed out by the decisions in a large class of cases of agency, and by the analogy of the measure of damages in trover. In those cases, the presumption is, in the first instance, to the full nominal amount of the loss, as it appears on the face of the transaction against the agent wanting in diligence, or the party guilty of the tortious conversion. Thus, where an agent or factor neglects to insure for his principal, according to order, he is held responsible for the default, *prima facie*, to the total amount which he ought to have covered by insurance. But at the same time he is allowed to put himself in the place of the underwriter, and to prove fraud, deviation, or any other defence which would have been good, had the insurance been made, or which would go to show that nothing at all, or how much, was actually lost by the neglect. *Delaney v. Stoddart*, 1 T. R. 22; *Wallace v. Tellfair*, 2 id. 188; *Webster v. De Tastet*, 7 id. 157. In the courts of this State, *Rundle v. Moore*, 3 Johns. Cas. 36. And in the courts of the United States, *Morris v. Summerl*, 2 Wash. 203. See also 1 Phil. on Ins. 521, and the cases there cited. So, too, in actions against sheriffs, where those official public agents become chargeable with the debt of another, by their own negligence or misconduct. When the default is established, the amount due the plaintiff in the original suit is the *prima facie* evidence of the measure of damages. This presumption may be controlled or rebutted, and the sheriff may give in evidence any fact, showing either that the party has not been actually injured, or to a much less amount. He may show, for instance, the insolvency of the original debtor. But the burden of proof is upon him; if he leaves the presumption uncontradicted, that establishes the meas-

ure of damages. This has been frequently ruled at our Circuits, nor can I find that it has ever been questioned in our Supreme Court, and is substantially recognized in *Potter v. Lansing*, 1 Johns. R. 215; *Russell v. Turner*, 7 id. 189. The Massachusetts decisions are particularly full and express on this very point. See 10 Mass. 470; 11 id. 89; ib. 188; 13 id. 187. Similar decisions may be found in the reports of other States. So again in trover. In *Ingalls v. Lord* (1 Cowen, 240), in trover for a note, it was held, that the *prima facie* measure of damages was the face of the note; but that evidence might be given to reduce the amount, by proving payment in part, or the insolvency of the maker, or any other fact invalidating the note or lessening its value.

It is true, that Lord *Tenterden*, in *Van Wart v. Woolley*, above cited, held that damages must be shown, and that the face of the bill is not the *conclusive* measure; but this I think is not in contradiction to the view that I have taken. I therefore take the cases before mentioned to point out the sound doctrine here. The face of the bill is the *prima facie* measure of damages. These may be reduced by any positive evidence proving the real damage to be less; but the burden of that proof must be upon the negligent agent, and not on the party who suffers by his negligence. Circumstances like those of the present case, may often render it difficult or impossible for either party to prove or even to form a probable estimate of the precise damages incurred by the agent's neglect. In such cases, is it not just that those chances of loss which must fall upon one or the other, should be thrown upon the party in default, and not upon the innocent sufferer? It was, then, for the defendants here to show that the debt would not have been paid had due diligence been used, or that there were any other circumstances to diminish the actual damages below the nominal amount. I do not see that this was done, and therefore think that Chief Justice Jones was right in his charge: "That the Court and jury having no knowledge what the amount of damages was except from the proof of the amount of the draft, the jury should find for the plaintiffs for the amount of the draft, and interest from the day it became due."

Perhaps the case was a hard one. So are many others that arise under our law of negotiable paper, in consequence of laches of parties. In all such instances, the hardship of the particular case must yield to the necessity of adhering to some general rule

founded on broad considerations of public policy. I can find no such rule safer or more conducive to commercial convenience, or sanctioned by stronger authority, than the one I have stated.

If, however, we abandon this rule, the only alternative, in my judgment, so far as authority governs, is to adopt the stricter doctrine of our Supreme Court, in *Le Guen v. Gouverneur* and *Kemble*, 1 Johns. Cas. 467, and affirmed in 1800, in this Court: "That where the property consists of *credits*, the agent whose breach of orders causes damages, is bound to answer to the amount of the credits, and the principal may abandon to him." The only defence distinctly recognized as valid in those doctrines, is that of fraud, or some similar one going to invalidate the whole contract.

Upon this principle, the agents here would be held to have made the paper their own by their default, if the plaintiffs below thought fit to abandon it to them; and this, perhaps, is the ground on which the Superior Court rested their decision in this case; the reasons of which I regret that we have not before us.

Under the circumstances of the case, either this rule or that which I have stated before, would affirm the judgments of the courts below; but I place my own vote for affirmance upon the ground first stated, as being the most equitable, the most conducive to public policy, and as supported by the analogy and authority of many modern decisions.

Judgment reversed.

In the rule for judgment of reversal, the following entry was made: "It is further ordered and adjudged, that an *agent* who receives a bill of exchange for *collection* which has not been accepted, is bound to present the same for acceptance without unreasonable delay, as well as to present the same for payment when it becomes due, or he will be liable to his *principal* for the damages which the latter sustains by such negligence."

The doctrine of this case is again held in the Court of Appeals in *Walker v. Bank of The State of New York*, 9 N. Y. (5 Seld.) 582, decided in 1854; and upon the ruling respecting damages seems just and reasonable. But it is held in *Bank of Washington v. Triplett*, 1 Peters, 25, (1828) in the case of a *bank* to which a bill had been sent for collection, that a settled usage of the bank, not to note the bill as dishonored, after calling on the drawer for acceptance, is a good defence against the charge of negligence. And it must be admitted that the language of Chief Justice *Marshall* is against the rule requiring the agent to present such bills as the one in question for acceptance; but no authorities were before him, and the case was actually decided upon the question of usage.

With respect to the time when bills payable at or after sight should be presented for acceptance, the only rule, whether the bill be foreign or inland, and whether payable at sight or so many days after sight, or in any other manner, is, that they must be presented within a reasonable time; and as the drawer may sustain a loss by the holder's keeping it any great length of time, it is advisable in all cases to present it as soon as possible; but he is not obliged to send it by the first opportunity. Chitty, Bills, 274; Story, Bills of Exchange, § 231; *Muilman v. D'Eguino*, 2 H. Bl. 565.

In the case of a foreign bill, payable after sight, it is no laches to put it into circulation before acceptance, and to keep it in circulation without acceptance, as long as the convenience of the successive holders may require; and it has been even laid down that, if such a bill drawn at three days' sight were kept out in that way for a year, this would not be laches. Chitty, Bills, 275; Story, Bills of Exchange, § 231. So, in the case of a bill payable in India sixty days, after sight, it would not necessarily be negligence to omit presenting it for acceptance for twenty-six days after its arrival; but if, instead of putting it into circulation, the holder were to lock it up for any length of time, this would be laches. *Muilman v. D'Eguino*, 2 H. Bl. 565.

In this case, *Eyre, C. J.*, said: "It is not necessary to lay down any new rule as to bills of exchange payable at sight, or within a given time afterwards. . . . It would be a very serious and difficult thing to say that a person buying a foreign bill in the way these were bought, should be obliged to transmit it by the first opportunity to the place of its destination. There would also be a great difficulty in saying at what place such a bill should be presented. The courts have been very cautious in fixing any time for presenting for acceptance an inland bill, payable at a certain period after sight, and it seems to me more necessary to be cautious with respect to a foreign bill payable in that manner. I think, indeed, the holder is bound to present the bill in a reasonable time."

Per *Buller, J.* "Due diligence is the only thing to be looked at, whether the bill be foreign or inland. . . . But I think a rule may be thus laid down as to laches, with regard to bills payable at sight, or a certain time after sight, viz., *that they ought to be put into circulation*; and if a bill drawn at three days' sight were kept out in that way for a year, I cannot say that there would be laches; but if, instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of laches; but further than this no rule can be laid down."

A similar question as to laches arose in *Goupy v. Harden*, 7 Taunt. 159, in an action upon a foreign bill payable thirty days after sight. *Gibbs, C. J.*, said: "The distinction is between bills payable at a certain number of days after date, and bills payable at a certain number of days after sight. In the former the holder is bound to use all due diligence, and to present such bill at its maturity; but in the latter case he has a right to put the bill into circulation before he presents it, and then, of course, it is uncertain when it will be presented to the drawee. It is to the prejudice of the holder if he delays to do it, and he loses his money and his interest." See also *Straker v. Graham*, 4 Mees. & W. 721; *Middleton Bank v. Morris*, 28 Barb. 616; *Mullick v. Radakissen*, 28 Eng. Law & Eq. 86; *Mellish v. Rawdon*, 9 Bing. 416; *Fry v. Hill*, 7 Taunt. 397; *Shute v. Robins*, Mood & M. 133; s. c., 3 Car. & P. 80; *Darbishire v. Parker*, 6 East, 12; Chitty, Bills, 274-279. If there is a clear and determinate usage of trade

which ascertains and fixes a definite time within which the presentment must be made, the usage will govern. Story, Bills of Exchange, § 231; Melish v. Rawdon, 9 Bing. 416.

The holder of an inland bill payable after sight, is not bound instantly to transmit the bill for acceptance; he may put it into circulation, and if he do not circulate it, he may take a reasonable time to present it for acceptance; and the keeping it an entire day after he received it, and a delay to present until the fourth day a bill on London, given within twenty miles of that city, is not unreasonable. Clitty, Bills, 273; Fry v. Hill, 7 Taunt. 397; Harker v. Anderson, 21 Wend. 372, and cases cited by the Court.

Respecting the question, What is reasonable time, see Harker v. Anderson, 21 Wend. 372, and Mohawk Bank v. Broderick, 13 Wend. 433.

Though there has been some conflict in England as to whether this is a question of law or fact (see cases above cited), the rule has become pretty well settled in this country, that the determination of the question must depend on the particular circumstance of the case; that if the facts are found, it becomes exclusively a question for the Court; if not, it is a mixed question of law and fact, to be determined by the jury, under proper instructions from the Court.

The result of the cases upon this subject may be stated thus:—

1. Presentment for acceptance, though always proper and advisable, is absolutely necessary only in the case of bills payable *on demand* or *at or after sight*; and it should be made within a reasonable time. It is always the wisest course, when practicable, to present the bill for acceptance before it is put into circulation, though the law does not require this.

2. If a bill payable at a certain time *after date* is presented for acceptance, — the advisable but not a necessary proceeding, — and the drawee refuses to accept, immediate notice should be given to the prior parties to charge them. But in Pennsylvania, protest and notice of non-acceptance in the case of foreign bills is not necessary. Read v. Adams, 6 Serg. & R. 356; Brown v. Barry, 3 Dall. 365; Clarke v. Russel, 3 Dall. 415. See Story, Bills of Exchange, § 273, note.

SPEAR AND PATTEN v. PRATT.

(2 Hill, 582. Supreme Court of New York, May, 1842.)

What constitutes acceptance. — If the drawee of a bill of exchange write his name across the face of the bill, this binds him as an acceptor; and this too, though the statute requires acceptance to be in writing, and signed by the acceptor or his agent.

THE defendant, drawee of a bill of exchange, wrote his name across the face of the bill. He was a resident of New York. The question was whether he was bound as an acceptor.

COWEN, J. Any words written by the drawee on a bill, not putting a direct negative upon its request, as “accepted,” “presented,”

“seen,” *the day of the month*, or a direction to a third person to pay it, is *prima facie* a complete acceptance, by the law merchant. Bayley on Bills, 163, Am. ed. of 1836, and the cases there cited. Writing his name across the bill, as in this case, is a still clearer indication of intent, and a very common mode of acceptance. This is treated by the law merchant as a written acceptance, — a signing by the drawee. “It may be,” says Chitty, “merely by writing his name at the bottom or across the bill;” and he mentions this as among the more usual modes of acceptance. Chitty on Bills, 320, Am. ed. of 1839.

It is supposed that the rule has been altered by 1 Rev. St. 757, 2d ed. § 6. This requires the acceptance to be *in writing*, and *signed* by the acceptor or his agent. The acceptance in question was, as we have seen, declared by the law merchant to be both a *writing* and *signing*. The statute contains no declaration that it should be considered less. An indorsement must be *in writing* and *signed*; yet the name alone is constantly holden to satisfy the requisition. No particular form of expression is necessary in any contract. The customary import of a word, by reason of its appearing in a particular place, and standing in a certain relation, is considered a written expression of intent quite as full and effectual as if pains had been taken to throw it into the most labored periphrase. It is said the revisers, in their note, refer to the French law as the basis of the legislation which they recommended; and that the French law requires more than the drawee’s name, — the word *accepted*, at least. That may be so; but it is enough for us to see that both the terms and the spirit of the act may be satisfied short of that word, and more in accordance with the settled forms of commercial instruments in analogous cases. The whole purpose was probably to obviate the inconveniences of the old law, which gave effect to a parol acceptance.

New trial denied.

Verbal acceptance is valid in the absence of statute, if communicated to him who takes the bill, and he takes it on the credit of such acceptance. *Fisher v. Beckwith*, 19 Vt. 31; *Bank of Rutland v. Woodruff*, 34 Vt. 89; *Martin v. Bacon*, 4 Const. 132; *Spanlding v. Andrews*, 48 Penn. State, 411; *Ward v. Allen*, 2 Met. 53; *Williams v. Winans*, 2 Green (N. J.), 339; *Ontario Bank v. Worthington*, 12 Wend. 593; *Rees v. Warwick*, 2 Barn. & Ald. 113; *Crowell v. Van Bibber*, 18 La. An. 637; *In re Agra, &c.*, Bank, Law Rep. 2 Ch. 391; *Coolidge v. Payson*, *infra*, and note.

Where a corporation draws upon itself, or a partner draws on his firm for

partnership purposes, or an individual on himself, formal acceptance is unnecessary; the act of drawing is deemed acceptance. *Hasey v. White Pigeon Sugar Co.*, 1 Doug. (Mich.) 193; *Dougal v. Cowles*, 5 Day, 511; *Cunningham v. Wardwell*, 3 Fairf. 466; *Marion, &c., R. Co. v. Hodge*, 9 Ind. 163.

If the drawee's agent write an order on the bill to another to pay it, this is an acceptance. *Harper v. West*, 1 Cranch. C. C. 192.

See further upon this subject, *Phillips v. Frost*, 29 Maine, 77; *Brannin v. Henderson*, 12 B. Mon. 61, in which the drawee had written upon the back of the bill, "I will see the within paid eventually;" *Edson v. Fuller*, 2 Foster, 183, in which a parol promise "to settle," was proved; *Barnet v. Smith*, 10 Foster, 256, in which a check was pronounced "good" by the cashier of the bank upon which it was drawn. In all these cases the words in quotation marks were held to constitute acceptance. *See quare.* See *Powell v. Jones*, 1 Esp. 17.

It has even been held that the words "I will not accept this bill," written on the draft, constitute a valid acceptance. *Lumley v. Palmer*, Cas. Temp. Hardw., London ed. 74. But so paradoxical a ruling may well be questioned. See *Bailey on Bills*, 164, note (2 Am. ed.), where it is said: "But by Lord Mansfield, in *Peach v. Kay*, . . . 'it was held by all the judges that an express refusal to accept, written on the bill where the drawee apprised the party who took it away what he had written, was no acceptance; but if the drawee had intended it as a surprise upon the party, and to make him consider it as an acceptance, they seemed to think it might have been otherwise.'" See 1 *Parsons, Notes and Bills*, 283.

COOLIDGE *et al.* *v.* PAYSON *et al.*

(2 Wheaton, 66. Supreme Court of the United States, February, 1817.)

Promise to accept. — A letter written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise; and this too though it was drawn in favor of a person who took it for a pre-existing debt.

THE case is sufficiently stated in the opinion of the Court.

MARSHALL, C. J. This suit was instituted by Payson & Co., as indorsers of a bill of exchange, drawn by Cornthwaite and Cary, payable to the order of John Randall, against Coolidge & Co. as the acceptors.

At the trial the holders of the bill on which the name of John

Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful owners. The defendants objected to the bill's going to the jury without further proof of the indorsement; but the Court determined that it should go with the affidavit to the jury, who might be at liberty to infer from thence that the indorsement was made by Randall. To this opinion the counsel for the defendants in the Circuit Court excepted, and this Court is divided on the question whether the exception ought to be sustained.

On the trial it appeared that Coolidge & Co. held the proceeds of part of the cargo of the "Hiram," claimed by Cornthwaite and Cary, which had been captured and held as lawful prize. The cargo had been acquitted in the District and Circuit Courts, but, from the sentence of acquittal, the captors had appealed to this Court. Pending the appeal Cornthwaite & Co. transmitted to Coolidge & Co. a bond of indemnity, executed at Baltimore with scrolls in the place of seals, and drew on them for two thousand seven hundred dollars. This bill was also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co. and protested for non-acceptance. After its protest, Coolidge & Co. wrote to Cornthwaite and Cary a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say, "this bond, conformably to our laws, is not executed as it ought to be; but it may be otherwise in your State. It will therefore be necessary to satisfy us that the scroll is usual and legal with you instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for two thousand dollars will be honored."

On the same day Coolidge & Co. addressed a letter to Mr. Williams, in which, after referring to him the question respecting the legal obligation of the scroll, they say, "you know the object of the bond, and, of course, see the propriety of our having one, not only legal, but signed by sureties of unquestionable responsibility, respecting which we shall wholly rely on your judgment. You

mention the last surety as being responsible; what think you of the others?"

In his answer to this letter, Williams says, "I am assured, that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means: and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the day on which this letter was written, Cornthwaite and Cary called on Williams, to inquire whether he had satisfied Coolidge & Co. respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co. also called on him to make the same inquiry, to whom he gave the same information, and also read from his letter book the letter he had written.

Two days after this, the bill in the declaration mentioned, was drawn by Cornthwaite and Cary, and paid to Payson & Co. in part of the protested bill of two thousand seven hundred dollars, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted that the plaintiffs were not entitled to a verdict: but the Court instructed the jury, that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite and Cary, did declare that he was satisfied with the bond referred to in that letter, as well with respect to its execution, as to the sufficiency of the obligors to pay the same; and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwaite and Cary, and without having seen or known the contents of the letter from Coolidge & Co. to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover in the present action; and that it was no legal objection to such recovery that the promise to accept the present bill was made to the drawers thereof, previous to the existence of such bill, or that the bill had been taken in part-payment of a pre-existing debt, or that the said Williams, in making the

declarations aforesaid, did ~~ex~~ceed the private instructions given to him by Coolidge & Co. in their letter to him.

To this charge the defendants excepted; a verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this Court on a writ of error.

The letter from Coolidge & Co. to Cornthwaite and Cary contains no reference to their letter to Williams which might suggest the necessity of seeing that letter, or of obtaining information respecting its contents. They refer Cornthwaite and Cary to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co. to Cornthwaite and Cary, to know that Williams was satisfied with the execution of the bond and the sufficiency of the obligors, and had informed Coolidge & Co. that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the Court to the jury is this: does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?

In the case of *Pillans and Rose v. Van Mierop and Hopkins*, 3 Burr. 1663, the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet in that case after two arguments, and much consideration, the Court of King's Bench (all the judges being present and concurring in opinion) considered the promise to accept as an acceptance.

Between this case and that under consideration of the Court, no essential distinction is perceived. But it is contended, that the authority of the case of *Pillans and Rose v. Van Mierop and Hopkins* is impaired by subsequent decisions.

In the case of *Pierson v. Dunlop et al.*, [2] Cowp. 571, the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Lord *Mansfield*, in delivering his opinion,

contradict those laid down in Pillan and Rose v. Van Mierop and Hopkins. His lordship observes, "it has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

If the case of Pillans and Rose v. Van Mierop and Hopkins, had been understood to lay down the broad principle that a naked promise to accept, amounts to an acceptance, the case of Pierson v. Dunlop certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn, was bound by his promise, either because he had funds of the drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued, that those circumstances to which Lord *Mansfield* alludes, must be apparent on the face of the letter. But the Court can perceive no reason for this opinion. It is neither warranted by the words of Lord *Mansfield*, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," &c. The answer must be "*accompanied* with circumstances;" but it is not said that the answer must *contain* those circumstances. In the case of Pierson v. Dunlop, the answer did not contain those circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the Court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is, that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and if it be shown, an absolute promise to accept will give all the credit to the bill which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of Mason v. Hunt, Dougl. 296, Lord *Mansfield* said, "there is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third

person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawee, or any other person, may show such promise upon the exchange to get credit; and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor."

What is it that "the drawer, or any other person, may show upon the exchange?" It is the promise to accept, — the naked promise. The motive of this promise need not, and cannot be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from Cowper and Douglas are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of *Pillans v. Van Mierop*, the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt, will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction; but the mere circumstance, that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept.

In the case of *Johnson and another v. Collins*, 1 East, 98, Lord *Kenyon* shows much dissatisfaction with the previous decisions on this subject; but it is not believed that the judgment given in that case would, even in England, change the law previously established. In the case of *Johnson v. Collins*, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorser. Consequently, the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended, that this naked promise amounted to an acceptance; but the Court determined otherwise. In giving his opinion, *Le Blanc, J.*, lays down the rule in the words used by Lord *Mansfield*, in the case of *Pierson v. Dunlop*; and Lord *Kenyon* said, that "this was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it." In *Clarke and others v. Cock*, 4 East, 57, the judges again express their dissatisfaction with the law as established, and their regret that any other act than a writ-

ten acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case, they unanimously declared a letter to the drawer promising to accept a bill, which was shown to the person who held it, and took it on the credit of that letter, to be a virtual acceptance. It is true, in the case of *Clark v. Cook*, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise: but no case has been decided on this distinction; and in *Pillans and Rose v. Van Mierop and Hopkins*, the letter was written before the bill was drawn.

The Court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this Court is of opinion, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the Circuit Court, and it is affirmed with costs.

Judgment affirmed.

The doctrine of the above case is re-affirmed in *Schmelpennich v. Bayard*, *post*, 64; *Townsley v. Sumrall*, 2 Peters, 170; *Boyce v. Edwards*, *post*, 52, and *Adams v. Jones*, 12 Peters, 207, on the point respecting a promise to accept.

In *Townsley v. Sumrall*, *supra*, the Court, *Story, J.*, held that if the drawee have no funds in his hands, and the fact is known to the party taking the bill, and yet the inducement to take the bill is the promise of the drawee to accept it, it constitutes a valid contract between the parties, if there is a purchase of the bill on the credit of such promise.

In *McEvers v. Mason*, 10 Johns. 207, decided in 1813, three years prior to the decision in *Coolidge v. Payson*, the Court, *Kent, C. J.*, drew the same distinction between the rights of one who has taken a bill on the faith of a promise to accept, and one who has not so taken it; and it was held that, as the indorsee had taken the bill in entire ignorance of any such promise, he could not recover from the defendants as implied acceptors.

Although doubts were expressed in this case whether an agreement to accept a bill thereafter to be drawn would amount to an acceptance, or could be enforced by the indorsee, yet the law is now considered well settled in America, that an agreement to accept is binding if the bill is drawn within a reasonable time, and such agreement was made known to the indorsee, and the bill was indorsed or negotiated on the credit of the acceptor. Per *Beardsley*, Senator, in *Greele v. Parker*, 5 Wend. 414, citing *Goodrich v. De Forest*, 15 Johns. 6. In *Greele v. Parker*, decided in 1830, *Walworth*, Chancellor, says: "It is a well settled rule of the commercial law of this country, and of most of the nations of Europe, except England, where it has recently been abolished by statute, that an unconditional promise *in writing* to accept a bill of exchange, if made within a reasonable time *before or after* the date of the bill, and describing the same in terms not to be mistaken, is a virtual acceptance thereof, in favor of any person to whom such promise has been shown, and who has received the bill for a valuable consideration, on the faith of such promise." That a promise to accept a non-existing bill constitutes an acceptance, see *Steman v. Harrison*, 42 Penn. State, 49; *Burns v. Rowland*, 40 Barb. 368; *Crowell v. Van Bibber*, 18 La. An. 637; *Bayard v. Lathy*, 2 McLean, 462; *Wilson v. Clements*, 3 Mass. 1; *Storer v. Logan*, 9 Mass. 55; *Carnegie v. Morrison*, 2 Met. 381; *Murdock v. Mills*, 11 Met. 5; *Russell v. Wiggin*, 2 Story, 213; *Plummer v. Lyman*, 49 Maine, 229, and other authorities cited in this note. But it must be observed that in such a case the promise must have been communicated to the indorsee, and that he took the bill on the credit thereof. *Chitty*, Bills, 285. It has been held that a promise to accept an *existing* bill may be sued upon as an acceptance, whether the holder took it on the credit of the promise or not. *Jones v. Bank of Iowa*, 34 Ill. 313; *Read v. Marsh*, 5 B. Monr. 8. But this may be doubted; and *Exchange Bank of St. Louis v. Rice*, 98 Mass. 288, is an ably considered case to the contrary.

In *Read v. Marsh*, the Court say that "it seems to be now well settled that a letter promising to accept or protect a bill, whether written *before* or *after* it is drawn, may operate as an acceptance, . . . although the holder has not been induced by such letter or promise to take the bill," citing *Chitty*, 177. But the text does not support this position; and this is certainly not the law respecting non-existing bills. In this case, the letter promising to accept, was written after the bill had been drawn.

Frequent expressions of regret occur that the doctrine of virtual acceptances of non-existing bills was ever advanced; and in *Wildes v. Savage*, 2 Story, 22, *Story*, J., it is held that the doctrine must be strictly confined to the case of bills to be drawn payable on demand or after date, and never extends to those payable *at or after sight*. It is a little remarkable that he should say (p. 29), that he has been unable to find a single case of that kind, when he himself delivered the opinion in *Payson v. Coolidge*, 2 Gall. 233, — the principal case in the Court below; from the report of which, as given in 2 Gallison, it appears that the bill in suit, and of which the defendants were there held as acceptors, was payable *at sight*. No notice of the distinction drawn in *Wildes v. Savage*, was taken either in the Court below, or on the appeal.

The question whether a *parol* promise to accept a non-existing bill is valid in favor of an indorsee for value, who took the bill on the faith of such promise,

has several times come before the courts of England and of this country. In *Miln v. Prest*, 1 Holt, 181 (1816), it is held that a parol promise in such a case is as valid as if it were in writing; but the contrary doctrine is held in *Bank of Ireland v. Archer*, 11 Mees. & Wels. 383 (1843). And *Parke, B.*, in this case, says that the report of *Miln v. Prest*, in Holt, is inaccurate, and refers to 4 Camp. 393, for a correct version of it. The language of *Parke, B.*, seems to cover the case of a *written*, as well as of a parol promise to accept a non-existing bill. This is sustained by the opinion of eminent English counsel in *Russell v. Wiggin*, 2 Story, 243; and see *Chitty, Bills*, 284-286. Mr. Chitty here reviews the English cases, and considers it "at least questionable whether a third person, who has taken a bill on the faith of such [written] promise, can treat the promise as equivalent to an acceptance." But see *In re Agra, &c.*, Bank, Law Rep. 2 Ch. Ap. 391 (1867), in which it is held that such third person may in equity compel the party to accept who had promised to do so.

In *Bank of Michigan v. Ely*, 17 Wend. 508, the Court, *Nelson, C. J.*, say that, previously to the statute requiring acceptances to be in writing, it was settled in that State that a parol promise to accept a future bill was not binding, unless the bill was taken by the holder upon the faith and credit of such promise; citing *Ontario Bank v. Worthington*, 12 Wend. 593. The converse would seem to follow from this, that if the holder did so take the bill, the parol promise would be binding. To this effect are *Crowell v. Van Bibber*, 18 La. An. 637; *Williams v. Winans*, 2 Green (N. J.), 339. *Contra*, *Kennedy v. Geddes*, 8 Port. (Ala.) 263; *Plummer v. Lyman*, 49 Maine, 232. But the promise in the last case came within the statute of frauds.

The doctrine being settled in this country, differently perhaps from that of the courts of England, that a promise to accept a non-existing bill under the restrictions above mentioned, may be sued upon as an acceptance, there seems to be no solid ground for the distinction between a written and a parol promise, when not within the statute of frauds, except where the statute requires acceptance to be in writing, as in England and New York. The *credit* given to the indorsee is that which gives the promise its binding force; and the inducement to take the bill may be as strong when the promise is in parol, as when it is written. That the ordinary promise to accept is not within the statute of frauds, is well settled. See *Townsley v. Sumrall*, 2 Peters, 170, and other cases, *supra*. There were special circumstances in *Plummer v. Lyman*, *supra*, which brought the promise within the statute.

If the drawee of a bill, drawn and indorsed for his accommodation, procure the same to be discounted and promise to pay the bill at maturity, this constitutes him an acceptor. *Bank of Rutland v. Woodruff*, 34 Vt. 89.

So if the drawee's agent write an order on the bill to another to pay it, this is an acceptance of the original bill. *Harper v. West*, 1 Cranch, C. C. 192.

BOYCE and HENRY, Plaintiffs in Error, v. TIMOTHY EDWARDS,
Defendant in Error.

(4 Peters, 111. Supreme Court of the United States, January, 1830.)

Promise to accept. Bill must be pointed out. — In order to bind as acceptor one who has promised to accept a non-existing bill, the particular bill must be pointed out and described in terms not to be mistaken.

Distinction between an action upon a bill as an accepted bill, and one founded on a breach of promise to accept.

THE case is stated in the opinion of the Court.

THOMPSON, J. This was an action of assumpsit, brought in the Circuit Court of the United States for the District of South Carolina, upon two bills of exchange drawn by Adam Hutchinson, in favor of Timothy Edwards, the plaintiff in the Court below, upon Boyce and Henry, the defendants, both bearing date on the 8th of February, 1827, the one for \$2100 and the other for \$2331, payable sixty days after sight.

The cause was tried before the district judge; and in the course of the trial, several exceptions were taken on the part of the defendants below to the admission of evidence, and the ruling of the Court upon questions of law, all which are embraced in the charge to the jury, to which a general bill of exceptions was taken; and the cause comes here upon a writ of error.

The bills of exchange were duly presented for acceptance, and on refusal were protested for non-acceptance and non-payment; but the plaintiff sought to charge the defendants as acceptors, by virtue of an alleged promise to accept before the bills were drawn. And whether such liability was established by the evidence, is the main question in the cause. The evidence principally relied upon for this purpose consisted of two letters, the first as follows: "Charleston, March 9, 1825. Mr. Edwards: Dear Sir, — Mr. Adam Hutchinson, of Augusta, is authorized to draw on us for the amount of any lots of cotton which he may buy and ship to us, as soon after as opportunity will offer; such drafts shall be duly honored by yours, respectfully, Boyce, Johnson, and Henry."

Johnson soon after died; and on the 28th of the same month of March, the defendants published a notice in the Charleston newspapers, announcing a dissolution of the partnership by the death of

Johnson, and that the business would be conducted in future under the firm of Boyce and Henry. The other letter is from the defendants, of the date of the 4th of January, 1827, addressed to Adam Hutchinson, in which they say, "you are at liberty to draw on us when you send the bill of lading. We do not put you on the footing of other customers, for we do not allow them to draw for more than three-fourths in any instance. You may draw for the amount," &c.

The defendants' counsel had objected to the admission of the first letter from Boyce, Johnson, and Henry, and contended that this did not bind Boyce and Henry to accept bills drawn on them after the dissolution of the partnership was known, and desired the Court so to instruct the jury. But the Court stated to the jury, that the said letter in connection with the other evidence in the cause was sufficient to charge the defendants as acceptors. The other evidence referred to by the Court, as would appear from other parts of the charge, was the letter of the 4th of January, 1827, the notice of the dissolution of the partnership, the accounts rendered by the defendants, and the numerous bills, drawn and accepted by them, all which had been given in evidence in the course of the trial.

According to the view which we take of the instruction given by the Court below at the trial, that the defendants, upon the evidence, were liable as acceptors, it becomes very unimportant to decide whether the letter of Boyce, Johnson, and Henry should have been admitted or not. For we think, in point of law, there was a misdirection in this respect, even if the letter was properly admitted. We should incline, however, to the opinion that this letter, at the time when it was offered and objected to, and standing alone, would not be admissible evidence against the defendants. It was dated nearly two years before the bills in question were drawn, and was from a different firm. It was evidence between other and different parties. A contract alleged to have been made by Boyce and Henry, could not be supported by evidence that the contract was made by Boyce, Johnson, and Henry. It might be admissible, connected with other evidence showing that the authority had been renewed and continued by the new firm, and in support of an action on a promise to accept bills drawn on the new firm. But that was not the purpose for which it was received in evidence, or the effect given to it by the Court in the part of the charge now under con-

sideration. It was declared to be sufficient, in connection with the other evidence, to charge the defendants as acceptors. And in this we think the Court erred. Had the letter been written by the defendants themselves, it would not have been sufficient to charge them as acceptors.

The rule on this subject is laid down with great precision by this Court, in the case of *Coolidge v. Payson*, 2 W. 66 [*ante*, p. 43], after much consideration and a careful review of the authorities: "That a letter written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." This case was decided in the year 1817. The same question again came under consideration in the year 1828, in the case of *Schimmelpennich et al. v. Bayard et al.*, 1 Peters, 264 [*post*, p. 64], and received the particular attention of the Court, and the same rule laid down and sanctioned; and this rule we believe to be in perfect accordance with the doctrine that prevails both in the English and American courts on this subject. At all events, we consider it no longer an open question in this Court, and whenever the holder of a bill seeks to charge the drawee as acceptor upon some collateral or implied undertaking, he must bring himself within the spirit of the rule laid down in *Coolidge v. Payson*, and we think the present case is not brought within that rule.

With respect to the letter of the 9th of March, 1825, in addition to the objection already mentioned, that it is not an authority to draw emanating from the drawees of these bills, it bears date nearly two years before the bills were drawn, and, what is conclusive against its being considered an acceptance, is, that it has no reference whatever to these particular bills, but is a general authority to draw at any time, and to any amount, upon lots of cotton shipped to them. This does not describe any particular bills in terms not to be mistaken.

The rule laid down in *Coolidge v. Payson*, requires the authority to be pointed at the specific bill or bills to which it is intended to be applied, in order that the party who takes the bill upon the credit of such authority may not be mistaken in its application.

And this leading objection lies also against the letter of the 4th of January, 1827. It is a general authority to Hutchinson to

draw, upon sending to the defendants the bills of lading for the cotton. This is a limitation upon the authority contained in the former letter, even supposing it to have been adopted by the new firm, and must be considered, *pro tanto*, a revocation of it. Hutchinson is only authorized to draw upon sending the bills of lading to the defendants. And although it may fairly be collected from the evidence, that that was done in the present case, it does not remove the great objection that it is a general authority, and does not point to any particular bills and describe them in terms not to be mistaken, as required by the rule in *Coolidge v. Payson*. The other circumstances relied on by the Court to charge the defendants as acceptors, are still more vague and indefinite, and can have no such effect.

The Court, therefore, erred in directing the jury that the evidence was sufficient to charge the defendants as acceptors, and the judgment must be reversed.

The distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence necessary to support the one or the other is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from circumstances and extended to all bills coming fairly within the scope of the promise.

Courts have latterly leaned very much against extending the doctrine of implied acceptances, so as to sustain an action upon the bill. For all practical purposes in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient and injurious to the credit of the bills; and this has led judges frequently to express their dissatisfaction that the rule had been carried as far as it has, and their regret that any other act than a written acceptance on the bill, had ever been deemed an acceptance.

As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise, they are equally secure, and equally attainable by an action for the breach of the promise to accept, as they could be by an action on the bill itself.

In the case now before the Court, the evidence is very strong, if

not conclusive, to sustain an action upon a count properly framed upon the breach of the promise to accept. The bills in question appear to have been drawn for the exact amount of the cost of the cotton shipped at the very time they were drawn. And if the bills of lading accompanied the advice of the drafts, the transaction came within the authority of the letter of the 4th of January, 1827; and if satisfactorily shown that the bills were taken upon the credit of such promise, and corroborated by the other circumstances given in evidence, it will be difficult for the defendants to resist a recovery for the amount of the bills.

With respect to the question of interest, we think that, if the plaintiff shall recover at all, he will only be entitled to South Carolina interest. The contract of the defendants, if any was made, upon which they are responsible, was made in South Carolina. The bills were to be paid there; and although they were drawn in Georgia, they were drawn, so far as respects the defendants, with a view to the State of South Carolina, for the execution of the contract.

The judgment of the Circuit Court must be reversed, and the cause sent back with directions to issue a *venire de novo*.

The following letter, in *Ulster County Bank v. McFarlan*, 5 Hill, 432, was held to be a sufficient promise to accept: "I hereby authorize you to draw on me at ninety days, from time to time, for such amounts as you may require, provided that the whole amount running and unpaid shall not exceed \$3000." And the Court, *Bronson, J.*, after citing *Bank of Michigan v. Ely*, 17 Wend. 508, and *Parker v. Greele*, 2 Wend. 545; s. c., 5 Wend. 414, say: "These cases show also that the written promise to accept need not contain a particular description or identification of the bill to be drawn."

The case was decided in favor of the defendant, on the ground that the authority was not strictly pursued. It was afterwards affirmed in the Court of Appeals on that defence. 3 Denio, 553. But *Hand*, Senator, takes occasion to deny the soundness of the doctrine advanced in the Supreme Court above mentioned, and thinks that a wrong view was taken of the cases of *Greele v. Parker*, and *Bank of Michigan v. Ely*. He says: "The first case was on a promise to accept for \$250 at three and four months, and was clearly intended to be but one transaction. The names of the parties and amount were given, and the time the bill was to run, which was a far more definite description than that given in this case. The last case turned on another point."

Again on p. 558: "But the ground upon which I put this part of the case is, that by the law of this country, irrespective of the statute, the promise must point to the particular bills, and describe them in terms not to be mistaken, and that the statute has in no way enlarged that rule."

The statute referred to is worthy of note. It reads as follows: "An uncondi-

tional promise in writing to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration," 1 R. S. 768, § 8, published in 1829. It will be seen that it says nothing concerning the necessity of the promise designating and describing the bill; and it is not difficult to see that there might be different views on this subject in construing the statute. But in the absence of statute, the rule in the principal case will be found a safe and just precedent.

The following cases further illustrate the subject: *Banorjee v. Hovey*, 5 Mass. 11; *Storer v. Logan*, 9 id. 55; *Carnegie v. Morrison*, 2 Met. 381; *Wildes v. Savage*, 1 Story, 22; *Baring v. Lyman*, ib. 396; *Russell v. Wiggin*, 2 id. 213; *Adams v. Jones*, 21 Peters, 207; and cases cited in note to *Coolidge v. Payson*, *supra*. See also *Burns v. Rowland*, 40 Barb. 368, in which the defendants authorized H. to draw on them for the amount he might owe the plaintiffs. The Court held that it was no objection that the draft was drawn for a specific sum not mentioned in the letter, and that the defendants were liable as acceptors.

JOHN HORTSMAN, Plaintiff in Error, v. JOHN HENSHAW *et al.*, Defendants in Error.

(11 Howard, 177. Supreme Court of the United States, December, 1850.)

What acceptance admits.—The drawee of a bill of exchange cannot recover the amount thereof paid to a *bona fide* holder, if the drawer put the bill into circulation bearing a forged indorsement of the payee's name. Acceptance admits the drawer's signature to be genuine, and the drawer, in such case, warrants the signature of the payee.

THE case is stated in the opinion of the Court.

TANEY, C. J. The material facts in this case may be stated in a few words.

Fiske and Bradford, a mercantile firm in Boston, drew their bill of exchange upon Hortsman of London, payable at sixty days' sight to the order of Fiske and Bridge, for six hundred and forty-two pounds sterling. The drawers, or one of them, placed the bill in the hands of a broker, with the names of the payees indorsed upon it, to be negotiated; and it was sold to the defendants in error *bona fide* and for full value. They transmitted it to their correspondent in London, and, upon presentation, it was accepted by the

drawee, and duly paid at maturity. The payees and indorsees all resided in Boston, where the bill was drawn and negotiated.

It turned out that the indorsement of the payees was forged, — by whom does not appear; and a few months after the bill was paid, the drawers failed and became insolvent. The drawee, having discovered the forgery, brought this action against the defendants in error to recover back the money he had paid them.

The precise question which this case presents does not appear to have arisen in the English courts; nor in any of the courts of this country with the exception of a single case, to which we shall hereafter more particularly refer. But the established principles of commercial law in relation to bills of exchange leave no difficulty in deciding the question.

The general rule undoubtedly is, that the drawee by accepting the bill admits the handwriting of the drawer; but not of the indorsers. And the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorized by them. And if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterwards discovered, he will be compelled to repay it.

The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill, and the holder therefore has no right to demand the money. If the bill is dishonored by the drawee, the drawer is not responsible. And if the drawee pays it to a person not authorized to receive the money, he cannot claim credit for it in his account with the drawer.

But in this case the bill was put in circulation by the drawers, with the names of the payees indorsed upon it. And by doing so they must be understood as affirming that the indorsement is in the handwriting of the payees, or written by their authority. And if the drawee had dishonored the bill, the indorser would undoubtedly have been entitled to recover from the drawer. The drawers must be equally liable to the acceptor who paid the bill. For having admitted the handwriting of the payees, and precluded themselves from disputing it, the bill was paid by the acceptor to the persons authorized to receive the money, according to the drawer's own order.

Now the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by his acceptance from averring the contrary in a suit brought against him by the holder. The rights of the parties are therefore to be determined as if this bill was paid by Hortsman out of the money of Fiske and Bradford in his hands. And as Fiske and Bradford were liable to the defendants in error, they are entitled to retain the money they have thus received.

We take the rule to be this. Whenever the drawer is liable to the holder, the acceptor is entitled to a credit if he pays the money; and he is bound to pay upon his acceptance, when the payment will entitle him to a credit in his account with the drawer. And if he accepts without funds, upon the credit of the drawer, he must look to him for indemnity, and cannot upon that ground defend himself against a *bona fide* indorsee. The insolvency of the drawer can make no difference in the rights and legal liabilities of the parties.

The English cases most analogous to this are those in which the names of the drawers or payees were fictitious, and the indorsement written by the maker of the bill. And in such cases it has been held that the acceptor is liable, although, as the payees were fictitious persons, their handwriting of course could not be proved by the holder. 10 Barn. & Cres. 478. The American case to which we referred is that of *Meacher v. Fort*, 3 Hill (S. C.), 227. The same question now before the Court arose in that case, and was decided in conformity with this opinion.

Another question was raised in the argument upon the sufficiency of the notice; and it was insisted by the counsel for the defendants, that, if they could have been made liable to this action by the plaintiff, they have been discharged by his laches in ascertaining the forgery and giving them notice of it.

But it is not necessary to examine this question, as the point already decided decides the case.

The judgment of the Circuit Court is affirmed, with costs.

The case of *Meacher v. Fort*, cited by *Taney, J.*, is so clearly stated, and so important, that the opinion is given in full.

Before *Evans, J.*, at Charleston, January term, 1837.

His Honor, the presiding judge, reported the case as follows:—

This was an action on a promissory note. The note was payable to *John Fort* and *Joseph Maybank*, and indorsed to the plaintiff, *Meacher*. The defendant was the maker. There was no doubt as to the signature of the defendant,

as maker, or of Maybank, one of the indorsers. The defence relied on was, that the signature of John Fort, one of the indorsers, was a forgery; and as the note was made payable to John Fort and Maybank, the plaintiff could not recover unless both indorsed it. There is no doubt of the correctness of this position, as a general rule. It was clearly proved that the signature was not John Fort's. But the plaintiff contended that the defendant himself had either forged the signature of John Fort, or had procured it to be done, and had put the note in circulation, and was thereby precluded from objecting to the forgery of the signature of the indorser, Fort, who was the defendant's father. The plaintiff, Meacher, was a *bona fide* holder, — having received the note from one Bruerton, on account of a debt due to him by Bruerton.

When the note became due, Meacher sent an agent (Stillman), to demand payment of the drawer, at his residence on Black River, fifteen miles above Georgetown. Stillman told him if it was not paid it would be protested, and the indorsers called upon for payment. The defendant replied it was impossible for him to pay it before January (the note was due 1st December), and spoke of selling some property to pay the debt. The demand of payment was made for Meacher.

A bond, signed by John E. Fort and John Fort, was offered in evidence, to enable the jury to decide whose writing the signature of John Fort was.

On the part of the defendant, John Fort was examined. He denied that the signature was his, or that he had ever authorized any person to sign his name on the note. In fact he had never heard of the existence of any such paper, until it was presented to him by Meacher, 1st February, 1833 (which was some months after its date: it was due 1st December, 1833). As soon as he knew of the note, he advertised it as a forgery. Defendant is his son, and lived, at the date of the note, at the thirty-two-mile house. A Mrs. Durant had rented the house of Bruerton, and kept a tavern. Defendant married her daughter, and heard him say he would buy the place if he could. He tried to do so, but could not make the payment. Bruerton had very little property, and the defendant never had any property from him of the value of this note (nine hundred dollars).

In my charge to the jury, I told them that from the evidence I thought Meacher should be regarded as the *bona fide* holder of this note, — he having received it from Bruerton in the course of a regular business transaction; but to enable him to recover against the maker, it was necessary to prove that the payees of the note had parted from their interest by indorsement. This was the general rule, but there were exceptions.

Among the exceptions which were applicable in this case, were these: —

1. If the maker of a note make it payable to a fictitious person, which fictitious name he writes on the note, and then puts it in circulation.
2. Or if he make it payable to a real person, and forge his indorsement, or if he procure it to be done, and then put it in circulation.

In these cases the drawer could not insist on proof of the indorsements, because he was estopped to say that was not genuine which he had represented to be so, by putting it in circulation.

It was submitted to the jury to decide, whether the evidence in this case brought it within these exceptions to the general rule. They found for the plaintiff. The notice of appeal is annexed.

On the trial the plaintiff contended he could recover on the promise made by defendant to pay at January, when Stillman demanded payment. I did not think so; but I find it alleged in the notice, as a ground that I did not instruct the jury that the plaintiff could not recover on this promise, unless it had been declared on. I certainly so decided in the hearing of the jury; and I charged them to find for defendant, unless they believed the case came within the exceptions hereinbefore stated.

The defendant moves for a nonsuit, or a new trial, on the grounds following:

1. Because the plaintiff's case was without evidence, in this that the declaration was upon a note, and no proof of the indorsement alleged in the declaration, which was necessary to convey a right to the plaintiff.

2. Because the Court did not instruct the jury that the plaintiff must recover on the note only, and could not recover upon the promise made to the plaintiff, as the same was not declared on; and, if it had been, was founded on no consideration.

3. Because the verdict was against the positive evidence, as to the indorsement, and the judge erred in charging the jury that, although the indorsement was not genuine, they were at liberty to presume it was made by the assent of the real payee of the note, and that if so made, the interest in the note was thereby passed to the plaintiff.

4. Because the judge erred in charging the jury that, if the name of the payee of the note was written by the maker, the plaintiff was entitled to recover under a declaration setting forth a real indorsement by the payee himself; whereas, it is submitted, that if such was the state of facts, the action should have been founded on the deceit.

CURIA, EVANS, J. This Court is of opinion there was no error in the charge of the presiding judge. The facts of the case were for the decision of the jury, and there does not appear to be any sufficient ground to disturb the verdict.

The motion is dismissed.

Gantt, Richardson, O'Neill, and Butler, JJ., concurred.

A similar question arose in 1817, in *Coggill v. American Exchange Bank*, 1 Comstock, 113. In that case one of the drawers of the bill forged the payee's name, and then procured it to be discounted; and at maturity the plaintiff, the drawee, paid it. On discovering the forgery he sued the defendant, a *bona fide* holder to whom he had paid the bill, to recover the sum paid. The Court held that the action could not be maintained; but based their decision on the fact stated, that the payee had no interest in the bill, comparing it to a bill drawn to a fictitious person, such a bill being in effect payable to bearer. *Vere v. Lewis*, 3 T. R. 182; *Minct v. Gibson*, ib. 481; s. c., 1 H. Bl. 769; *Collins v. Emmett*, 1 H. Bl. 313; *Phillips v. Thurn*, Law Rep. 1 C. P. 463; *Plets v. Johnson*, 3 Hill, 112. The point made in the principal case was not noticed, that, in such case, the drawer is estopped to deny the genuineness of the indorsement; that he is thus liable to the *bona fide* holder, and that, therefore, the drawee is entitled, on payment, to a credit against the drawer. Whence it would follow that it is immaterial that the payee had no interest in the bill, when the drawer himself puts it into circulation, bearing the payee's indorsement. But, according to *Coggill v. American Exchange Bank*, explaining, on this point, *Canal Bank v. Bank of Albany*, 1 Hill, 287, if the payee *owned* the forged bill, the ac-

ceptor would be entitled to recover the sum paid to the holder. It must be confessed there is difficulty in harmonizing the two cases, unless the language of the principal decision is used with reference to the case of a payee without interest; and yet, if that be true, how can it be said that in such case the drawee has paid to one not entitled to receive the money? The case seems to cover the whole ground of a payee who owned the bill, as well as of one who had no interest in it. And a further explanation than the very satisfactory one given by Judge Taney, may perhaps be given to the case; that it rests upon the familiar principle that of two innocent parties, he should suffer who occasioned the difficulty. The drawee, by accepting, induced the holder to part with his money. See opinion of *Keating, J.*, in *Phillips v. Thurn*, Law Rep. 1 C. P. 472. The case of *Canal Bank v. Bank of Albany*, *supra*, may at first seem to present a different view; but it must be observed that it is nowhere stated in that case that the forged bill was put into circulation by the drawer, — the distinguishing fact in all the other above cases. See also *Burchfield v. Moore*, 3 E. & B. 683; *Talbot v. Bank of Rochester*, 1 Hill, 295; *Young v. Grote*, 4 Bing. 253. These cases show that the drawer is not estopped to deny the genuineness of the indorsement, if the forgery occurred after the bill passed out of the drawer's hands; and this is the line of distinction drawn in the principal case. This may have escaped the notice of the learned judge (*Bronson*), in *Coggill v. American Exchange Bank*. And we repeat that it must be understood that the principal case and the above discussion are predicated of forgery committed before the drawer put the bill into circulation.

Though it is true in general that the acceptor does not warrant the genuineness of the signature of any indorser, still, if he accept and negotiate the bill with knowledge that there is a forged indorsement upon it, he is estopped to deny the genuineness of such indorsement. *Beeman v. Duck*, 11 Mees. & W. 251.

It has been held that, though acceptance admits the genuineness of the drawer's signature, the rule does not apply where the forgery is in the body of the bill, as in the sum to be paid; that the reason and justice of the rule extend no farther than to the signature. With the drawer's handwriting, as indicated in his signature, the drawee is bound to be familiar, but with nothing else. *Bank of Commerce v. Union Bank*, 3 Comst. 230 (1850). In this case the amount of the bill was altered from \$105 to \$1005; and the acceptor having paid the latter sum, was held entitled to recover it from him to whom he had paid it. But the law upon this point does not seem to be so settled. See *Bytes, Bills*, 323; *Ward v. Allen*, 2 Met. 53, decided in 1840, and *Langton v. Lazarus*, 5 Mees. & W. 629, decided in 1839, in which cases it is held that the fraudulent alteration of the day of payment, made before acceptance, is no defence to the acceptor in an action by a *bona fide* holder. And in *Van Duzer v. Howe*, 21 N. Y. 531 (1860), *post*, it is held that where the defendant wrote his blank acceptance on an agreement with the drawer that he should not draw for more than \$1000, and he inserted in the bill a larger sum, and passed it for value to the plaintiff, the defendant was nevertheless liable.

So in *Young v. Grote*, 4 Bing. 253 (1827), it is held that, if the drawer facilitated or gave occasion to the forgery, he must bear the loss himself. In that case the bill had been so drawn by leaving a space after the mark "£," that the amount

was changed from £52.2, to £352.2, and the drawer was required to bear the loss, after payment by the drawee. See Byles, Bills, 323.

The acceptance of a bill drawn by procuration admits the handwriting of the drawer, and also the procuration; but it does not admit the agent's power to indorse, though the handwriting is the same as that of the drawer, and though the indorsement preceded the acceptance. *Robinson v. Yarrow*, 7 Taunt. 455 (1817); *Smith v. Chester*, 1 T. R. 654.

If, however, the drawer is a fictitious person, and the bill is drawn payable to the drawer's order, the acceptor's undertaking is that he will pay to the signature of the same person that signed for the drawer; and in such case the indorsee may show, as against the acceptor, that the signatures of the fictitious drawer and of the first indorser, are in the same handwriting. *Cooper v. Meyer*, 10 Barn. & C. 468.

A party who admits that an acceptance is in his own handwriting, and thereby induces another to take the bill, is precluded thereafter from denying the genuineness of the acceptance. *Leach v. Buchanan*, 4 Esp. 226.

So if the acceptor puts the bill into circulation, he cannot be allowed to allege that he paid it before maturity. *Hinton v. Bank of Columbus*, 9 Port. Ala. 463. *

Acceptance for the honor of an indorser does not admit the genuineness of the indorser's signature. *Wilkinson v. Johnson*, 3 Barn. & C. 428. And the reasoning of *Abbott, C. J.*, in this case is perhaps broad enough to warrant the rule as laid down in 1 Parsons, Notes and Bills, 323, that acceptance for honor does not admit the genuineness of the signature of any party for whose honor the acceptance is given, not even of the drawer's signature.

The acceptor for honor then occupies a more favorable situation than an acceptor in at least two respects: first, that he is entitled to notice, like an indorser, on presentment to and non-payment by the drawee; secondly, that he can recover money paid to a holder who claims under a forgery of the drawer's name, according to the rule in Parsons and the reasoning in *Wilkinson v. Johnson*, *supra*.

But one who accepts for the honor of the drawer is, like the drawer himself, estopped from denying that the bill is a valid bill; and consequently it is not competent to him to set up as a defence to an action against him by an indorsee, that the payee is a fictitious person, and that he was ignorant of that fact at the time he accepted the bill. *Phillips v. Thurn*, 18 Com. B. (N. S.) 694 (1865); s. c., again in Law Rep. 1 C. P. 463. See next case and note.

In this case, the bill was payable to a fictitious payee, and therefore held equivalent to a bill payable to bearer. *Erle, C. J.*, said: "I take it to be clear that if the defendant had not intervened, and the action had been brought by the holder of the bill against the drawer, the drawer would have been by law compelled to admit that the bill was a valid bill, payable to bearer. . . . It seems to me there is good reason for saying that that which the drawer would be estopped from denying, the acceptor for honor should also be estopped from denying. I think that he is equally bound to admit that the bill is a valid bill." 18 Com. B. 701.

GERRIT SCHIMMELPENNICH and JAN ADRIAN TOE LEAR,
 Aliens, v. WILLIAM BAYARD, WILLIAM BAYARD, Jr., ROBERT
 BAYARD, and JACOB LE ROY.

(1 Peters, 264. Supreme Court of the United States, January, 1828.)

Acceptance supra protest. — If the drawees of a bill of exchange, refusing to honor the bill, were bound to accept the same, they will not be permitted to change the relation in which they stand to the parties on the bill by a wrongful act. They can acquire no rights as the holders of bills paid *supra protest*, if they were bound to honor them in their character of drawees.

When bound to accept. — A drawee, who has been in the habit of receiving consignments from the drawer with whom he has an open account therefor, is not bound to accept bills drawn on him against a particular shipment, which bills the drawer in his letter of advice says may be charged in account, if the account actually show that the drawer had no funds in the hands of the drawee.

THE case is stated in the opinion of the Court.

MARSHALL, C. J. This action was brought on nine bills of exchange, drawn by John C. Delprat, on the plaintiffs, and indorsed by the defendants, a list of which follows : —

Baltimore, May 23, 1822,	£500	favor of J. P. Kraft.
“ “ 27 “	200	favor of defendants.
“ “ “ “	300	“
“ “ “ “	500	“
“ June 12 “	1000	“
“ “ 18 “	300	“
“ July 31 “	1000	“
“ “ “ “	fr. 10,000	“
“ “ “ “	5000	“

These bills were regularly protested for non-acceptance and non-payment ; but were accepted and paid *supra protest*, by the drawees, for the honor of the defendants the indorsers. The jury found a verdict for the plaintiffs, subject to the opinion of the Court, on a case stated. The judges were divided in opinion on the following points, which have been certified to this Court.

1. Whether the authority to John C. Delprat to draw on the plaintiffs, did or did not amount to an acceptance of the bills.

2. Whether the bills paid by the plaintiffs, *supra protest*, for the

honor of the defendants, were drawn and negotiated in conformity to the authority and instructions of the plaintiffs to J. C. Delprat.

3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether the same having been paid by the plaintiffs, *supra protest*, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants.

4. Whether J. C. Delprat was a competent witness.

5. Whether the letter offered by the plaintiffs in evidence, and rejected, ought to have been admitted.

6. Whether the plaintiffs are entitled to a judgment on the verdict of the jury.

These questions require an examination of the relations which existed between the drawer of these bills and the drawees.

On the 11th of January, 1818, the plaintiffs entered into a contract with John C. Delprat, of which the following is a copy.

The undersigned, N. and J. and R. Van Staphorst, merchants in this city, and John C. Delprat, of Philadelphia, present the last choosing for the present act his *domicilium citandi et exequendi*, at the office of the youngest notary here, have entered with one another into the following arrangement and stipulations:—

ART. I. The second undersigned (namely, J. C. Delprat) shall to the benefit of the first undersigned (N. and J. and R. V. S.) manage in the United States of America, the mercantile interest of said first undersigned, consisting chiefly in the forming of new solid connections, and procuring of consignments; and shall further perform every thing the first undersigned will appoint him to do as their agent.

ART. II. The second undersigned binds himself to procure to no person or persons in this kingdom any consignments or commissions from himself or any other, except to the first undersigned; but, on the contrary, to use his utmost exertions towards the benefit of the mercantile house of the first undersigned, they being willing on their side to facilitate all such commercial operations as might benefit the second undersigned without their prejudice.

ART. III. The first undersigned allows to the second undersigned the faculty to value on them direct, or payable in London, at no shorter date than sixty days' sight, for such moneys as the second undersigned shall employ to make advances on whole or part of cargoes of current articles, namely, to the amount of two-thirds of

the invoice price of articles laden in chartered vessels, and of three-fourths in vessels owning to the shippers, and likewise consigned to the first undersigned ; it being left to the knowledge and prudence of the second undersigned to judge of the invoice price of the aforementioned goods : and it being understood that the second undersigned, at the same time that he gives advice of his drafts furnished in the above manner, shall enclose and forward,* or cause to be enclosed and forwarded, to the first undersigned, the bill of lading and invoice of the goods on which the above-mentioned advances might have been made ; and shall cause the above goods to be duly insured in America to that effect, that the policy of said insurance be delivered up, duly indorsed, to the second undersigned, and rests with him until the end of the expedition. It being further a fixed rule that the first undersigned must never come in the predicament of having made any advances on cargoes or part of cargoes which are not duly insured in America.

The first undersigned further oblige themselves to open a credit of \$40,000, say forty thousand dollars, with Messrs. Le Roy, Bayard, & Co., New York, to be made use of by the second undersigned, in case any advances are required on consignments to be made to the said first undersigned, that credit to be renewed every time by the said first undersigned, after the arrivement of the consigned goods shall have been duly advised by them.

If, however, against all probability, it happened that the multiplicity of consignments rendered it desirable to the first undersigned to stop for a while further consignments, then the said first undersigned retain the faculty to prescribe to the second undersigned such limits and orders as they shall find proper, according to circumstances, which orders and limits the second undersigned shall be obliged to follow.

ART. IV. As sometimes an opportunity might offer to procure a good consignment to the first undersigned, on condition of their taking an interest in that expedition, they authorize the second undersigned to make use likewise of the above-mentioned credit of \$40,000 to interest the first undersigned ; in such expeditions for a proportion not larger than one-fourth, with this restriction, that said proportion must never exceed the amount of \$10,000, say ten thousand dollars. The choice of the articles to be shipped to the first undersigned on their own account, being left to the commercial knowledge of the second undersigned. This authorization will be considered as renewed after the termination of each expedition ;

namely, after that termination shall have been duly advised to the second undersigned by the first undersigned.

ART. V. That the first undersigned, in consideration of the services to be rendered by the second undersigned, shall grant to the second undersigned one-third of the amount of the two per cent commission, to be earned by the first undersigned on the consignments to be procured, and further, one per cent from the purchase of such goods which might be shipped for the account of the first undersigned, as is more amply specified in article 4; it is to be understood that then no benefit arises from the third of the two per cent commission of those good; and finally, that the second undersigned is promised an allowance for travelling and other expenses the sum of \$2000, say two thousand dollars, per annum, to commence with the first of February, 1818.

ART. VI. These arrangements shall last for the term of two consecutive years, and thus end with the last day of January, 1820. It being understood that (in case of no denunciation to the contrary, made by any of the parties aforesaid) this contract will be continued from year to year, but that, in case one of the parties should desire the annulment of the present contract, said party shall be obliged to signify his intention to the other party four months before the expiration thereof.

ART. VII. Ultimately, it has been stipulated that in the unhopd-for and wholly unexpected case of any differences taking place between the undersigned, respecting the fulfilment of any of the articles above mentioned, those disputes or differences shall be entirely adjusted and decided by the decision of two arbiters, to be chosen in the city of Amsterdam, one by each party: who, in case of difference of opinion between them, shall have the faculty of appointing a third or super arbiter, which arbiters then must decide and finally terminate all such differences: both parties renouncing to all law measure and impediments, and especially to the faculty of laying any arrests or hindrance on moneys, goods, or possessions, belonging to any one of the parties undersigned: all such aforesaid measures to be considered now and then as null, void, and of no effect whatsoever; the consequences thereof to be suffered by the party which might have made use of the aforesaid measures.

Of the present act have been made two copies, &c.

(Signed)

N. and J. and R. VAN STAPHORST.
JOHN C. DELPRAT.

AMSTERDAM, 11th January, 1818.

A copy of this contract was transmitted by the plaintiffs to the defendants, in a letter dated the 21st of the same month, a copy of which follows.

AMSTERDAM, 21st January, 1818.

Messrs. LE ROY, BAYARD, & Co., New York (confidential).

Gentlemen, — Thinking it useful for the extension of our commercial relations in the line of consignments (one of the branches of our establishment), to appoint an agent to that purpose in the United States of America, we have been decided by the confidence we place in the character and commercial notions of Mr. John C. Delprat, to appoint that gentleman to the aforementioned trusts ; in which choice we have chiefly been directed by the reliance we have on the principles of loyalty and prudence, which must actuate a person employed during such a long period by your worthy house. We judged it necessary, for the obtaining of said purpose, to leave at the disposal of Mr. Delprat sufficient means to facilitate his exertions ; namely, by opening with you, in his favor, a credit to be made use of by him in the manner pointed out in the enclosed abstract of our contract with said gentleman. We therefore request and authorize you to furnish Mr. Delprat to the extent of \$40,000, say forty thousand dollars (to be made advances with by him on such cargoes, or part thereof, as he might procure the consignment of to our house, and to be made use of to interest our house in part of cargoes to the forementioned purpose). The credit to run for the space of two years, unless countermanded by us in such a manner that, when Mr. Delprat has availed himself of the whole or part of said credit of \$40,000, that credit, or part of the same, must be considered renewed when you receive our approbation of the said disposition of Mr. Delprat.

You will observe, the sole object of the mission of Mr. Delprat is to obtain solid consignments from good houses, throughout the United States, and the disposal of the credit opened in his behalf with your house is exclusively intended to facilitate said business. In this important matter, it will be a point of great security, and, as such, eminently satisfactory to us, that our said agent may be able to have recourse, in every circumstance, to wise and friendly counsel ; and we therefore request you to assist Mr. Delprat, as far as opportunity may offer, with the lessons of your long experience, particularly with respect to those transactions for which, by virtue

of the credit aforementioned, we may have recourse to your cash, it being, as you will observe, a material point that we are secured ; that the moneys he may dispose of will have no other than the destination just mentioned. To this effect, we authorize you, gentlemen, in case of moral certainty that the moneys Mr. Delprat should demand from you by virtue of the above-mentioned credit, would not be employed in the aforementioned manner, and earnestly request you not to pay, and to refuse him, any moneys whatsoever, on account of the above credit.

In general, as a trust of this nature, which is to have its effect at such a distance, is always a delicate matter, we must claim and dare expect from your known sentiments towards us, that you will give the strictest attention to the line of conduct followed by Mr. Delprat ; and if, unexpectedly, that conduct could appear in the least exceptionable, we mean either imprudent or equivocal, then, gentlemen, do give us, with all the frankness of long-experienced friendship, your ideas respecting that subject, and be perfectly secure that every information, of what nature soever, will not only be thankfully acknowledged by us, but received with the most religious secrecy. We have now, gentlemen, only to request your kind offices in favor of Mr. Delprat, and to solicit your friendly co-operation towards the attaining the object of his mission, which, we are fully persuaded, can be much facilitated by your kind recommendation to the numerous friends you have in different parts of your country. Be assured, gentlemen, of the high sense we have of the obligation we will have to you for your friendly services through the whole of the business we just now took the liberty to explain to you, and of the earnest desire we have to be often in the opportunity of rendering you the like, or any services in our power. Referring for commercial information to our general letter of this date, we are, with sincere regard,

Gentlemen, your most obedient servants,

N. and J. and R. VAN STAPHORST.

(Indorsed), Confidential, Amsterdam, 21st of January, 1818.
N. and J. and R. Van Staphorst. Received March 29th. Answered 24th do.

This letter was answered by Le Roy, Bayard, & Co. in the following terms : —

PRIVATE.

NEW YORK, 24th March, 1818.

Messrs. N. and J. and R. VAN STAPHORST, Amsterdam.

Gentlemen, — We have the honor of replying to your esteemed favor of 21st of January, acquainting us with the arrangement you have made with our mutual friend, Mr. Delprat, who has undertaken the agency of procuring you consignments from this country. In the furtherance of the object, we shall be very happy to render our services useful, and beg to offer our best wishes for the success of Mr. Delprat's operations in your behalf. Due note is taken of the credit you are pleased to open to that gentleman with us, to the amount of \$40,000, subject to renewal, as fully expressed in your letter. We doubt not, from the knowledge we possess of Mr. Delprat's character, that he will fully justify the confidence you repose in him; and though he may, under existing circumstances, find it difficult to enlarge to the extent that could be mutually wished, we are persuaded that no exertion will be wanted on Mr. Delprat's part, to reap the utmost benefit from the mission intrusted to him.

Believe us, with honor and esteem, gentlemen,

Your obedient servants,

LE ROY, BAYARD, & Co.

It is proper to observe that several merchants of Holland, whose agents the plaintiffs were, had become large holders of government stock, and of shares in the Bank of the United States. Le Roy, Bayard, & Co. had been employed to draw the interest and dividends, and to remit them to Europe. The credit of \$40,000, therefore, which was raised for Delprat, with Le Roy, Bayard, & Co., was merely the application of so much of their funds, in the United States, to the business of his agency, in aid of the bills he was authorized to draw on them. The continuance or discontinuance of this credit might depend on the eligibility of continuing this mode of remittance, as well as on the withdrawal of their confidence in their agent. Several letters passed between the plaintiffs and defendants, respecting their transactions in consequence of this credit, which manifest, unequivocally, the desire of the plaintiffs that its amount should not be exceeded, but which betray no want of confidence in Delprat. In a letter of the 24th of June, 1819, they renew the credit of \$40,000, and add, "at the same time, we con-

firm our former orders not to exceed said amount for our account. In case you have funds in hand, for any of our institutions, and you think proper to remit us for the same Mr. Delprat's bills on us, the nature of which you are well acquainted with : you allow him, then, the same credit which you do to all persons from whom you take bills, in the persuasion of their solidity and of the reality of the transaction on which the bills are issued."

In answer to this letter, the defendants say, on the 24th of September, 1819: "You also accord us the permission to remit this gentleman's (Delprat's) drafts for any moneys we may have on hand belonging to your various institutions. The confidence which we mutually have in this gentleman's character, must, with us, act in lieu of vouchers, to exhibit the reality of transactions which may give origin to such drafts, the whole of this gentleman's operations having been hitherto beyond our immediate knowledge."

This correspondence continued until the 12th of May, 1820, when N. and J. and R. Van Staphorst addressed a letter to Messrs. Le Roy, Bayard, & Co., of which the following is an extract:—

"There being frequent opportunities of drawing here now, on New York, we will probably have, for some time to come, occasion to dispose of the dividends which 'you will receive for our account, in October next,' and so on ; and we have therefore directed Mr. Delprat not to make use of his credit of \$40,000, lately opened in his favor. We thus also request you, by the present, to consider the same as annulled until we may again renew the same."

The agency of Delprat continued after this revocation of his credit with Le Roy, Bayard, & Co. He continued to solicit consignments for their house in Amsterdam, and to draw bills on them for advances, without any other alteration in his powers than is contained in a letter of the 6th of February, 1821, which contains the following clause: "The advances, therefore, to be made by you on our behalf, on shipments to our consignments, either from funds belonging to us in your hands, or by drawing and indorsing the shipper's draft, must not exceed, henceforth, one-half of the 'true invoice.'" As a compensation for this reduction of the advance to be made in the United States, J. and N. and R. Van Staphorst engaged, on the arrival of the shipments, to remit to the consignors the estimated value of the cargoes in bills on their house in the United States.

Delprat acknowledged the receipt of this letter on the 17th of April, 1821, and promised to conform to its directions.

The correspondence between the plaintiffs and defendants, respecting Mr. Delprat's agency, appears to have ceased on the 12th of May, 1820, when his credit with the house of the latter was annulled. At least, no subsequent letter appears in the record until the 9th of July, 1822, when the plaintiffs announced to the defendants the sudden termination of their connection with Mr. Delprat; whose conduct, they said, had been so imprudent as to oblige them, at the same time, to protest several of his drafts. Their knowledge, they say, of the former intercourse between Le Roy, Bayard, & Co. and Mr. Delprat, and of the great regard felt for him by those gentlemen, induce them to state the chief reasons which compelled them to this measure. These are, his irregularities in keeping his accounts, and omission to furnish an account since the 31st of December, 1820, although the balance then due from him was fully \$7837.54, being "for the proceeds of gin consigned by us to him; for proceeds of drafts, issued by him on us, for our account, in order to employ the proceeds to make prudent advances with," &c.

They then proceed to state that Mr. Delprat owed, at that date, upwards of 82,000 florins, against which he might be entitled to a credit of \$6000. The account, they say, has accrued to this height, in a great measure, "in consequence of shipments made to him for his account, in full confidence of his making us, for the amount, remittances; which we till now have not received, though the goods were with him for many months." The letter complains of the large advances made by Mr. Delprat, on consignments, notwithstanding their repeated remonstrances; and dwells on the high opinion they had entertained of him; "his integrity," they say, they "even now will not question." Thus, the letter proceeds, "were matters situated, when last Friday, contrary to any thing we could expect or anticipate, we found ourselves drawn upon by Mr. Delprat, for £200, £300, and £500, issued, as he informs us, for the amount of purchases which he is making of articles not yet shipped;" and, on the other hand, 2d, £500, florins 1250 and 1750, issued on us, as advances made to Mr. Krafft, already so much our debtor, on shipments which he made some long time ago, and which Mr. Delprat could clearly perceive that, taken at an average, did nothing diminish the balance due by him."

The letter proceeds to state, in substance, that they could choose only between the alternatives of allowing the debt due from Mr. Delprat to be swelled to a still larger amount, and protesting his bills. They had chosen the latter, however it might pain their feelings. They express their regret to find that, among the drafts to be protested for non-acceptance, and perhaps afterwards for non-payment, are several indorsed by the defendants, for whose honor, however, they had intervened.

This letter was received by the defendants on the first day of September, 1822. They immediately obtained from Mr. Delprat an order on the plaintiffs to hold at their disposal all the proceeds of the goods shipped in his name, by the "Virgin" and other vessels, and all balances due to him. This order was enclosed to the plaintiffs, in a letter of the 7th of September, 1822, in which they say: "We can of course only consider this order as applying to the balance that may possibly accrue to him upon the settlement of your account: and if any should accrue, we will thank you to take such legal steps which you may deem necessary, as will place it with us, without fear of contention. His drafts, which you may have paid for our account, will probably furnish sufficient authority to enable you to do so."

At the trial, John C. Delprat was examined as a witness. He deposes that the several bills of exchange on which this suit was instituted, were drawn in his capacity as agent, on account of and for the purpose of making advances on shipments consigned to the plaintiffs; and, except that in favor of J. P. Krafft, for £500, were accompanied by letters of advice. That during the whole period of his agency, he was in the habit of making shipments on his own account, and of drawing for advances on the said shipments precisely in the same manner as when they were made by others; that this was done with the full knowledge and approbation of the said N. and J. and R. Van Staphorst, who never found fault with him for doing so; but to encourage him to make such shipments, gave him credit for one-half the commission upon the sales of the shipments so made upon his own account. On his cross-examination, the witness stated that the bill for £500 in favor of Krafft was drawn for shipments, by the "Edward," "Jason," and "May Flower." He cannot say when the "Edward" sailed. The "Jason" had arrived, and the "May Flower" had sailed before the bill was drawn. Krafft was at that time indebted to the plaintiffs. The bill was issued to

Krafft, but was returned to witness, who sent it to the defendants. The bills of lading and the invoices were not sent with it. The three bills of the 27th of May, for £1000, were drawn on account of shipments, in his own name, by the "Virgin." She sailed about the 30th of July. They were not accompanied by invoices or bills of lading. The two bills of the 12th and 18th of June, for £1000 and for £300, were drawn on tobacco shipped by the "Henry," belonging to the witness and to Mr. Krafft. The bill of lading and invoice did not accompany them. The three bills of the 31st of July were drawn on the shipments by the "Virgin" generally. They were not accompanied by bills of lading or invoices. The defendants received a commission for indorsing his bills on the plaintiffs.

In making the advances on shipments on his own account, he drew on the plaintiffs, sent his bills to the defendants, to whom they were charged, and then drew on the defendants, as the money was required, either on his own shipments or the shipments of others; which bills were credited to the defendants. He understands that all his transactions with the defendants were carried by them into their general account with him. These transactions were not confined to his agency for the plaintiffs. He remains considerably indebted to them.

He was concerned in shipments with Mr. Krafft, and did a great deal of business with him; but did not consider himself as a general partner.

The connection between the plaintiffs and J. C. Delprat, was formed by the agreement of the 11th of January, 1818. He was constituted their agent for purposes therein described, and received such powers as were deemed sufficient to enable him to perform the duties which devolved on him. That duty was to manage their mercantile interest in the United States, "consisting chiefly in the forming of new solid connections, and procuring of consignments." To enable him to perform this duty, he was allowed the faculty to value on them direct or payable in London, at no shorter date than sixty days' sight, for such moneys as he should employ to make advances on the whole or part of cargoes of current articles; namely, to the amount of two-thirds of the invoice price, &c. It being understood that his letters of advice should be accompanied by the bills of ladings and invoices of the goods on which the advances may have been made.

John C. Delprat, then, had no general authority to personate the

plaintiffs in all respects whatever; but was an agent appointed for particular purposes, with limited powers, calculated to subserve those purposes. To procure consignments, it was indispensable that he should advance money to the consignors, and this money was to be raised by bills on the plaintiffs. But he was authorized to draw only for a special purpose, and to a limited extent. Out of the limits assigned to him, he had no power. The plaintiffs not being, as a matter of course, the acceptors of every bill he might draw, must have performed some act in relation to the particular bills, which imposes on them in law the character of acceptors.

This point was considered by this Court, in the case of Coolidge and others *v.* Payson and others, 2 W. 66 [*ante*, p. 43].

Coolidge & Co. held the proceeds of a cargo, claimed by Cornthwaite and Cary, whose claim depended on the decision of this Court, of a case depending therein. Cornthwaite and Cary were desirous of drawing these funds out of the hands of Coolidge & Co., and offered a bond, with sureties, as an indemnity, in the event of an unfavorable decision. Coolidge & Co., in a letter to Cornthwaite and Cary, state some formal objections to the bond, and add, "we shall write to our friend Williams, by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. Williams feels satisfied on this point, he will inform you; and in that case your draft for \$2000 will be honored."

In answer to the letter addressed by Coolidge & Co. to Williams, on this subject, he declared his satisfaction with the bond, as to form: declared his confidence that the last signer was able to meet the whole amount himself: but that he could not speak certainly of the principals, not being well acquainted with their resources. He added, "under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the same day, Cornthwaite and Cary called on Williams, who stated the substance of the letter he had written, and read a part of it. One of the firm of Payson & Co. also called on him, and received the same information. Two days afterwards Cornthwaite and Cary drew on Coolidge & Co. for \$2000, and paid the bill to Payson & Co., who presented it to Coolidge & Co., by whom it was protested. Payson & Co. sued them as acceptors.

The Court instructed the jury that if they were satisfied that

Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite and Cary, did declare that he was satisfied with the bond referred to in that letter; and that the plaintiffs on the faith and credit of the said declaration, and also of the letter to Cornthwaite and Cary, did receive and take the bill in the declaration; they were entitled to recover in the action.

The jury found a verdict for the plaintiffs; the judgment on which was affirmed in this Court.

In this case, the drawee had written a letter to the drawer, promising to honor his bill for \$2000, if Mr. Williams should be satisfied with a bond of indemnity, which had been placed in their possession. Mr. Williams declared his satisfaction with it, both to the drawer and holder of the bill, within two days after this declaration. In this case the promise to accept was express, and applied to a particular bill, the precise amount of which was specified in the promise.

The Court in its opinion reviews several decisions in England on this point; in all of which the promise to accept was express; and in some of which the Court declared the opinion that the promise ought to be accompanied by circumstances which may induce a third person to take the bill. After reviewing these cases, this Court laid down the rule, "that a letter written within a reasonable time before or after the date of the bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

It cannot be alleged that these bills are brought within this rule. The plaintiffs, therefore, cannot be considered as acceptors of them.

But, although the plaintiffs cannot be viewed as the acceptors of these bills, it does not follow, necessarily, that they can maintain the present action. To entitle them to maintain it, the Court must be satisfied that the payment is, in fact, what it professes to be, — a payment really for the honor of the indorsees. If the drawees, thus refusing to honor the bill, and thus denying the authority of the drawer to draw upon them, were bound in good faith, to accept or pay as drawees, they will not be permitted to change the relation in which they stand to the parties on the bills by a wrongful

* act. They can acquire no rights, as the holders of bills paid *supra protest*, if they were bound to honor them in their character of drawees. The single and unmixed inquiry, therefore, on the second and third questions is, whether the drawees were bound to accept or to pay these bills. And, first, were they so bound because the bills were drawn in pursuance of the authority they had given to the drawer? This demands a more critical examination of the evidence than was required when considering the first question.

It is apparent, from the contract of the 11th of January, 1818, that Mr. Delprat came to the United States as the agent of N. and J. and R. Van Staphorst, to manage their mercantile interest; "consisting chiefly in forming new solid connections and procuring of consignments;" and also with commercial views of his own. The principal object of the contract is to define his authority, and to regulate his conduct as agent. He is allowed to draw on the plaintiffs for such moneys as he should employ, in making advances on current articles consigned to his principals, to the amount of two-thirds of the invoice price of articles laden in chartered vessels. He was still further restricted in his advances, by orders received long before the bills in question were drawn, to one-half of the true invoice. Mr. Delprat's authority, then, to make advances was limited, at the date of this transaction, to one-half the invoice price. One, and perhaps the most usual mode of conducting business of this description is, to draw in favor of the consignor, or to indorse his bill. The agent might, however, if not otherwise instructed, draw immediately on his principal, and advance the money to the consignor which was raised by the bill. In either case, however, drafts beyond one-half the invoice price of the consignments actually made would exceed the authority given. Circumstances may exist, which would impose on the principal the obligation to pay such drafts: but the question we are now considering relates only to the authority under which the bills were drawn. That authority restricted the agent in the amount of his drafts to one-half the invoice price of the articles actually consigned; and also required him to accompany his letters of advice with bills of lading and invoices.

Were the bills in question drawn in conformity with powers and instructions thus limited?

The first bill on the list is for £500, drawn in favor of J. P.

Krafft, on the 23d of May, 1822, and indorsed by him to the defendants. The letter of advice states this bill to be drawn on account of shipments by the "Edward," "Jason," and "May Flower," as by letter of 21st, which is to be charged to account of P. Krafft. The letter of the 21st is not in the record.

The shipment by the "Jason" had arrived, and the "May Flower" had sailed before the bill was drawn. Mr. Krafft was at the time indebted to N. and J. and R. Van Staphorst. The bill was returned by Krafft to Delprat, and then indorsed by the defendants.

It does not appear certainly who remitted this bill; although the probability is that, as it was indorsed by the defendants, not as purchasers, but for a commission, it was remitted by Delprat, to whom it was returned by Krafft, as is stated in Delprat's testimony, or by some person to whom Delprat sold it. It is true that he further states that, after the bill was so returned, he sent it to the defendants; but this was, no doubt, done for the purpose of having it indorsed by the defendants, in order to give it credit. Neither does it appear, from the evidence in the cause, that Krafft accompanied the shipments on account of which this bill was drawn, by any letter of advice, or otherwise directing the proceeds thereof to be applied to the discharge of this bill; but, on the contrary, the letter of advice addressed to the plaintiffs by Delprat directed the bill to be charged to the account of Krafft, generally. Under these circumstances, taken in connection with the additional one that Delprat was concerned, generally, with Krafft, in the shipments made to the plaintiffs, the Court is of opinion that there is no material difference between this bill and those drawn on account of shipments made by and in the name of Delprat, which are now to be considered.

It has already been stated that Mr. Delprat was a merchant, trading on his own account, at the same time that he was the agent of N. and J. and R. Van Staphorst. His transactions, in his two characters, were as distinct from each other as if they had been the transactions of distinct persons. As an agent, he was bound to act "in conformity to the authority and instructions" of his principals; as a merchant, he was himself the principal, and acted in conformity with his own judgment. It would seem, then, that the contract must contain some very peculiar and unusual provisions, to place Mr. Delprat under the authority of the house

in Amsterdam, whilst carrying on trade in the United States on his own account. Upon reference to the contract, we find a stipulation between the parties in the following words: "The second undersigned (Delprat) binds himself to procure to no person or persons in this kingdom any consignments or commissions, from himself or any other, except to the first undersigned; but, on the contrary, to use his utmost exertions toward the benefit of the mercantile house of the first undersigned; they being willing, on their side, to facilitate all such commercial operations as might benefit the second undersigned, without their prejudice."

This article contains the only limitation on the entire independence of Mr. Delprat as a merchant. It is, perhaps, a necessary limitation, which was, in part, the price of his agency, and for which he finds a compensation in the profits of the business confided to him. This restriction does not change the character of his transactions as a merchant. His waiving the right to consign to any other house, does not impress on his consignments to the Van Staphorst, or on his bills drawn on those consignments, a character different from that which would have belonged to them had his shipments been made from choice. He does not bind himself to make consignments to them; but not to make consignments to any other house in the Netherlands.

If any doubt could arise from this article, it would be produced by the peculiar manner in which it is expressed. Mr. Delprat binds himself to procure to no person in the kingdom of the Netherlands any consignments or commissions, from himself or any other, except to the Van Staphorst. The singular application of the word "procure," to consignments made by Mr. Delprat himself, may be connected with the succeeding article, which authorizes him to draw bills, and may have some influence on its construction. In that article, the Van Staphorst allow Mr. Delprat "the faculty to value on them direct, or payable in London," for such moneys as he shall employ to make advances on the whole or part of cargoes of current articles consigned to them, to the amount of two-thirds of the invoice price.

It may be said that, as in the preceding article, consignments made by Delprat on his own account were considered as procured by him, and were placed on the same footing with consignments made by others; so in this the express authority to draw bills might embrace transactions of both descriptions. But we do not

think that the inaccurate use of words in one article will justify a departure from the correct construction of a succeeding article; unless the same words are used, or the bearing of the one on the other is such as to require that departure.

The same motives existed for restraining the agent from making as from procuring consignments to any other house in the Netherlands. His utmost exertions were required for the benefit of his principals. The restriction, therefore, might be expressed in the same sentence; and a slight inaccuracy of language was the less to be regarded, because it could produce no possible misunderstanding with respect to the extent of the prohibition.

The third article might not be intended to prescribe the same rules for the conduct of Mr. Delprat, as a merchant and as the agent of the Van Staphorsts. As a merchant, he had a right to draw on effects placed in their hands, independent of contract. The usage of trade allows such drafts to be made on a shipment; and the consignee must pay the bills, if the shipment places funds in his hands to pay them. But, as agent, his line of conduct was to be prescribed by contract. We must therefore, consult the language of the agreement, in order to determine whether it provides for the future connection between the parties, further than as regards their characters as principal and agent.

The faculty given to Mr. Delprat by the third article, to value on the Van Staphorsts, is "for such moneys as he should employ to make advances" on articles consigned to them. Money laid out in the purchase of articles on his own account cannot, with any propriety of language, be denominated money employed in making advances on articles consigned to him. The distinction between money advanced on articles consigned and money employed in purchases, although the articles may be purchased for the purpose of being consigned is obvious. Money advanced is always to another, never to the individual making the advance. This language shows, we think, incontestably, that the article was drawn with a sole view to bills drawn by Mr. Delprat as agent, not on his own account as a merchant.

A subsequent part of the article gives additional support to this construction. Mr. Delprat is to draw for two-thirds of the invoice price of the article, and is himself the judge of the price which may be inserted in the invoice. This power might be safely confided to him in making advances to others, but might not be

trusted to him in his own case. The case shows the Van Staphorsts to have been men of extreme caution. Their letter to Le Roy, Bayard, & Co., enclosing their contract with Delprat, shows an unwillingness to commit themselves to him further than was necessary. It is not probable that they would have given him an express authority to draw on his own account on invoices to be priced by himself.

But the language of the article applies, we think, entirely to his bills drawn as agent, not to those drawn as a merchant transacting business for himself.

When examined as a witness, Mr. Delprat says that, during the whole period of his agency, he was in the habit of making shipments on his own account, to the said house in Amsterdam, and of drawing for advances on account of the said shipments so made, precisely in the same manner as when the shipments were made by others; and this was done with the full knowledge of N. and J. and R. Van Staphorst, who never found fault with him for doing so; but, in order to encourage him to make such shipments, gave him credit for one-half the commission upon the sales of the shipments, so made on his own account.

The Van Staphorsts were commission merchants, desirous of extending their business. No doubt can be entertained of their willingness to receive consignments from Mr. Delprat, as well as from others. But this does not prove that the power given him as their agent, to make advances to others, was intended to regulate the intercourse between them as merchants. That intercourse was regulated by the general principles of mercantile law; and the contract between the parties does not show that either was dissatisfied with those principles, or wished to vary them.

This question refers, we presume, to the authority given by the contract of the 11th January, 1818. The first article describes the objects which were committed to Mr. Delprat, by the Van Staphorsts. These were: the management of their mercantile interest in the United States, consisting chiefly in the forming new solid connections, and procuring of consignments."

The second article restrains the right Mr. Delprat might otherwise have exercised, of consigning to other houses in the Netherlands.

The third authorizes him to draw bills on his principals, for the

purposes of his agency, under such limitations as they deemed it prudent to prescribe.

This contract, we think, does not contemplate bills drawn by Mr. Delprat on his own account, as a merchant. The bills mentioned in the declaration, which were drawn in favor of the defendants, and indorsed by them, do not come within the authority given by the contract. No instructions from the plaintiffs, extending this authority, appear in the record.

The third question comprehends the whole matter in controversy, and has been partly answered in answering the preceding questions. It asks whether the plaintiffs were bound to accept and pay the bills in question; and whether the same having been paid by the plaintiffs, *supra protest*, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants?

The opinion has been already expressed that the bill, drawn on the 23d May, 1822, for £500 sterling, in favor of J. P. Krafft, is not distinguishable from those which were drawn by Mr. Delprat, to enable him to purchase articles on his own account, which were shipped to the plaintiffs. In making these shipments, and in drawing these bills, Mr. Delprat acted for himself, as an independent merchant. The relation between him and the plaintiffs was that of consignor and consignee. The obligation of the plaintiffs to accept and pay his bills, depended essentially on the state of their accounts. So far as the information furnished by the case goes, Delprat appears to have been indebted to the plaintiffs. In their letters of 19th July and 10th September, 1822, which were given in evidence by the defendants, they state him to be then their debtor; and it is not shown that this debt has been discharged. The plaintiffs, therefore, were not bound to accept and pay these drafts, unless they have acted in such a manner as to give the holders of the bills a right to count on their being paid.

It is believed to be a general rule, that an agent with limited powers cannot bind his principal when he transcends his power. It would seem to follow that a person transacting business with him on the credit of his principal, is bound to know the extent of his authority. Yet, if the principal has, by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given, he could not be permitted to avail himself of the imposition, and to protest bills, the

drawing of which his conduct had sanctioned. But the defendants, in this cause, cannot allege that they have been deceived. They were the intimate correspondents of the plaintiffs, from whom they received a copy of the contract. The letter which transmitted it, requests their friendly supervision of the conduct of Mr. Delprat, and desires them not to pay the money for which the plaintiffs had given him a credit with them, in case of "a moral certainty" that it would not be employed for the purposes of his agency. In the course of the correspondence between the plaintiffs and defendants, we find several letters, written during the continuance of Mr. Delprat's credit with the latter, which show the determination of the former not to approve of advances beyond that credit. In their letter of the 24th June, 1819, the plaintiffs expressly caution the defendants, should they think proper to remit in Mr. Delprat's bills, the nature of which they are well acquainted with, that they (the defendants) allow him the same credit that they do other persons, from whom they take bills, in the persuasion of their solidity, and of the reality of the transaction on which the bills are issued. They add: "This is not the effect of any want of confidence in our agent, but merely profloing from our invariable rule to limit and circumscribe the credits we allow." The letters from the defendants show a perfect understanding on their part, of the terms on which Mr. Delprat's bills were to be taken. On the 11th May, 1819, announcing that he had filled his credit, they say: "In addition to it, he has expressed an anxiety that we should negotiate his drafts on you, payable in London, for about £3000 sterling, or that we should take his drafts on Amsterdam, for a similar value. The personal regard which we bear for Mr. Delprat, would have induced us promptly to accede to his request, had not the restriction laid upon us, of not permitting him to exceed, but for a few hundred dollars, the credit you give him, and the total absence of any indication from you of a wish for us to interfere in his pecuniary arrangements, in any other than the mode marked by the credit, led us to believe that our negotiations or purchase of his drafts, was neither wished nor contemplated by you." And, in their letter of the 7th September, 1822, enclosing the order of Mr. Delprat on the plaintiffs, for any balances belonging to him in their hands, so far from complaining of the protest of the bills, they say: "We can, of course, only consider this order as applying to the balance

that may possibly acerue to him, upon the settlement of your account."

Messrs. Le Roy, Bayard, & Co., then, were not deceived by the plaintiffs. Unfortunately for themselves, they placed too much confidence in Mr. Delprat. They took his bills, as they were cautioned to do, in the letter of the 24th June, 1819, "in the persuasion of their solidity, and of the reality of the transaction on which they were issued." If in this they were mistaken, the responsibility and the loss are their own. The fourth and fifth questions have been waived by the parties, and do not properly arise in the case. They are on exceptions taken in the trial of the cause, which could not be brought before the Court after verdict, but on a motion for a new trial, which was not made.

The sixth question, whether a judgment can be rendered on the verdict of the jury, has been answered, so far as this Court can answer it. We do not understand it as referring to the amount of the verdict, for, on that the Circuit Court alone can decide. If it is intended to repeat, in another form, the question whether the plaintiffs can maintain their action, as the holders of bills, accepted and paid, *supra protest*, for the honor of the drawers, it is already answered.

The decision of a majority of this Court, on the points on which the judges of the Circuit Court were divided, will be certified in conformity with the foregoing opinion.

This cause came on to be heard, on a certificate of division of opinion of the judges of the Circuit Court of the United States, for the Southern District of New York, and on the points on which the said judges were divided in opinion, and was argued by counsel, on consideration whereof, this Court is of opinion, —

1. That the authority to John C. Delprat to draw on the plaintiffs did not amount to an acceptance of the bills.

- 2 and 3. That the bills mentioned in the declaration, were drawn by the said Delprat, not under the authority of the plaintiffs, but on his own account; and the plaintiffs were not bound to accept and pay them, unless funds of the drawer came to their hands.

- 4 and 5. These questions are understood to be waived, and do not appear to arise in the case.

6. The sixth question is decided by the answer to the second and

third, so far as respects the right of the plaintiffs to maintain their action. On the *quantum* of damages, this Court can give no opinion.

All which is ordered to be certified to the Court of the United States for the Second Circuit and District of New York.

See next case.

WILLIAM KONIG, an Alien, Plaintiff below, *v.* WILLIAM BAYARD, WILLIAM BAYARD, Jr., ROBERT BAYARD, and JACOB LE ROY.

(1 Peters, 250. Supreme Court of the United States, January, 1828.)

Acceptance supra protest by stranger. — It is no objection that a stranger has intervened as acceptor for the honor of an indorser ; or that his acceptance has been made at the request and under the guaranty of the drawee. But in such case the indorser may avail himself of all defences which he could have made had the drawee accepted for his honor and then sued upon such acceptance.

THE case is stated in the opinion of the Court.

MARSHALL, C. J. This suit was brought in the Court of the United States for the Second Circuit and District of New York, on a bill of exchange, drawn by John C. Delprat, of Baltimore, on Messrs. N. and J. and R. Van Stapthorst, of Amsterdam, in favor of Le Roy, Bayard, & Co., of New York, and indorsed by them. The bill was regularly presented, and protested, after which it was accepted and paid by the plaintiff, for the honor of the defendants. The jury found a verdict for the plaintiff, subject to the opinion of the Court, on a case stated by the parties. The judges of the Circuit Court were divided in opinion on the following points : —

1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted.
2. Whether the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honor of the defendants, and is entitled to recover the amount with charges and interest.

The first question is understood to be waived. It is a question

which was decided by the Court at the trial, and could not arise after verdict, unless a motion had been made for a new trial.

The second requires an examination of the case stated by counsel. The bill was transmitted by Le Roy, Bayard, & Co., to Messrs. Rougemont and Behrends, of London, to have it presented for acceptance, who enclosed it to the plaintiff in a letter, from which the following is an extract: "We beg you to have the enclosed accepted: 1st of fl. 21,500, 60 days, on N. and J. and R. Van Staphorst, and hold the same to the disposal of 2d, 3d, and 4th. You will oblige me by mentioning the day of acceptance, and in case of refusal, you will have the bill protested."

The plaintiff gave immediate notice of the dishonor of the bill, and of their intervention for the honor of the defendants.

Messrs. N. and J. and R. Van Staphorst addressed a letter to the defendants, dated the 26th November, 1822, giving notice that the bill was dishonored, the drawer having no right to draw, and that they were advised by counsel not to interpose in their own names for the honor of the defendants. The letter adds: "In this predicament, we applied to our friends, William Konig & Co., who had the said bill in hand, informed them of the whole case, and requested these gentlemen, under our guarantee, to intervene on behalf of your signature, with acceptance and payment of the above bill; which favor these gentlemen have not refused to us; so that, without our prejudice, and completely without yours, we have duly protected your interest."

The defendants also gave in evidence a letter from the plaintiff, stating that he had intervened, at the request of N. and J. and R. Van Staphorst, and under their guarantee; but that they required him to proceed against the defendants, as preliminary to the performance of that guarantee.

It was admitted that the bill was drawn by J. C. Delprat, on his own account, and not on any shipment for a debt due from him to the defendants, for advances previously made to him; and that he had given to the defendants an order on N. and J. and R. Van Staphorst, for all balances due from them to him.

It is not alleged that the drawees had any funds of the drawer in their hands.

The plaintiff in this case must be considered as the agent of N. and J. and R. Van Staphorst, and as having paid the bill at their instance. All parties concur in stating this fact. The Van Stap-

horsts adopted this circuitous course, instead of interposing directly in their own names, under the advice of counsel. They, however, immediately stated the transaction in its genuine colors, to the defendants. It is impossible to doubt that a person may thus intervene, through an agent, if it be his will to do so. The suspicion which might be excited by proceeding, unnecessarily, in this circuitous manner, cannot affect a transaction, which was immediately communicated, with all its circumstances, to the persons in whose behalf the intervention had been made; unless those persons were exposed to some inconvenience, to which they would not have been exposed had the interposition been direct. This is not the case in the present instance, since it cannot be doubted that the defendants might have availed themselves of every defence in this action of which they could have availed themselves had N. and J. and R. Van Staphorst been plaintiffs. The case shows plainly that the bill was not drawn on funds, and that the drawees were not bound to accept or pay it. No reason, therefore, can be assigned why the person who has made himself the holder of the bill, by accepting and paying it under protest, should not recover its amount from the drawer and indorsers.

This cause came on to be heard on a certificate of division of opinion of the judges of the Circuit Court of the United States for the Southern District of New York, and on the points on which the said judges were divided in opinion, and was argued by counsel; on consideration whereof this Court is of opinion that the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honor of the defendants, and is entitled to recover the amount with charges and interest; which is ordered to be certified to the said Circuit Court.

In regard to the defences which a drawer or indorser may raise against a stranger who accepts for his honor, it seems to be immaterial whether such acceptor acted at the instance of the drawer or as the agent of the drawee, as in the above case; at least no distinction is drawn in the cases upon this point. See *Gazzam v. Armstrong*, 3 Dana, 554; *Wood v. Pugh*, 7 Ohio, 156 (Curwen's ed. 501).

An accepted bill which has been dishonored may be accepted again for honor upon the insolvency of the drawee. See *Ex parte Wackerbath*, 5 Ves. 574; *Ex parte Lambert*, 13 Ves. 179. In the latter case Lord *Erskine* disapproves the position taken in the former, that in such case the acceptance is given to an accepted bill, and holds that the acceptor for honor stands precisely in the place

of the drawer in an action against the drawee, and can acquire no stronger title against the latter than the drawer had.

The acceptor *supra protest* is considered in the light of an indorser; and therefore at maturity the bill must be again presented to the drawee, and if still dishonored by him, it should be protested, and notice given to the acceptor for honor, or he will be discharged. *Hoare v. Cazenove*, 16 East, 391; *Williams v. Germaine*, 7 B. & C. 468; *Schofield v. Bayard*, 3 Wend. 488; *Lenox v. Leverett*, 10 Mass. 1.

A stranger to the bill may, by paying it *for the honor of the parties*, acquire a right of action against all of them, and will be considered as standing in the place of a *bona fide* holder. But to entitle him to this attitude, he must pay the bill, not for the honor of *any one*, but of all the parties, and not before but after protest; and the payment should be accompanied by a declaration, evidenced by a notarial act, showing why, and for whom, the payment was made; and of all this the parties to be charged should have notice. Per *Marshall, J.*, in *Gazzam v. Armstrong*, 3 Dana, 554. See *Geralopulo v. Wieler*, 10 C. B. 690, 709; *Phoenix Bank v. Hussey*, 12 Pick. 483. And if the party who has paid a bill *supra protest* do not give reasonable notice to the party for whose credit he has made the payment, the latter will not be required to refund. *Wood v. Pugh*, 7 Ohio, 156 (Carrwen's ed. 501).

In a suit by a holder who discounted a bill on the faith of an acceptance for honor, the bill being forged, the acceptor *supra protest* cannot deny its genuineness. *Phillips v. Thurn*, Law R. 1 C. P. 463. See note to *Hortsmann v. Henshaw*, *ante*, 63, *sub fin.*

THE UNITED STATES, Plaintiffs in Error, v. THE BANK OF THE METROPOLIS, Defendant in Error.

(15 Peters, 377. Supreme Court of the United States, January, 1841.)

Acceptance by the United States. — The liability of the United States, on an acceptance by an authorized officer given to a *bona fide* holder is the same as that of a private individual.

Conditional acceptance. — A bill drawn by a government contractor was "accepted on condition that the drawer's contracts be complied with," and discounted by the defendants in due course of trade. *Held*, that forfeitures previously incurred, and advances previously made, were not covered by the condition.

THE case is stated in the opinion of the Court.

WAYNE, J. This is an action of assumpsit brought by the United States to recover the sum of \$27,881.57. The defendants pleaded the general issue. On the trial of the cause, the defendants claimed credits, amounting to \$23,000, exclusive of interests and costs.

The items had been presented to the proper accounting officer, and were not allowed. They were acceptances of the post-office department, of the drafts of mail contractors, and an item of \$611.52, called in the record "E. F. Brown's overdraft."

The jury found for the defendants, and certified there was due to them by the United States \$3371.94, with interest from the 6th March, 1838.

The errors assigned are, that the Court refused to give to the jury the following instructions, which were asked after the evidence had been closed on both sides.

1. That upon the evidence aforesaid, the defendants are not entitled in this action to set off against the plaintiffs' demand, the amount of the acceptances given in evidence by the defendants, nor the amount of the overdraft of E. F. Brown.

2. If the jury believe, from the evidence, that when the acceptance of the draft of E. Porter was given by the then treasurer of the department, there was nothing due to Porter standing on the books of the post-office department, and that on the books of the department, when the acceptance fell due, there was nothing due to him; then the defendants cannot set off the amount of said acceptance against the plaintiffs' claim in this action.

3. That if the accounts of E. Porter and Reeside, as contractors with the post-office department, were not finally settled on the books of the post-office department when the present postmaster-general came into office, it was his duty to have said accounts settled: and if in such settlement there were credits claimed by them as allowed by order of Mr. Barry, when postmaster-general, and entered on the journal, but not carried into these accounts in the ledger, and finally entered as credits in these accounts, which credits were for extra allowances which the said postmaster-general was not legally authorized to allow them, then it was in the power, and was the duty of the present postmaster-general, to disallow such items of credit.

We will consider the instructions asked in connection, and upon the merits of the case: but, before we conclude, will express an opinion upon the form of the first.

It appears that the five drafts claimed as credits were drawn on the post-office department by contractors for carrying the mails. That they were accepted, and were discounted at the Metropolis Bank in the way of business.

Porter's draft was at ninety days after date for \$10,000, payable at the Metropolis Bank to his own order, to be charged to account, and was unconditionally accepted by R. C. Mason, signing himself treasurer of the post-office department. It is admitted that he was so.

Reeside drew four drafts. One on the 17th October, 1835, for \$4500; another on the 20th October, 1835, for \$1000; a third on the 23d October, 1835, for \$4500; and the fourth on the 28th October, 1835, for \$3000. They were payable to his own order ninety days after date, for value received; to be charged to his account for transporting the mail, and addressed to the postmaster-general. The following was the form of all of them, and of the acceptances of the postmaster-general.

\$4500.

WASHINGTON CITY, October 17, 1835.

SIR, — Ninety days after date, please pay to my own order, four thousand five hundred dollars, for value received, and charge to my account, for transporting the mail.

Respectfully yours,

JAMES REESIDE.

Hon. AMOS KENDALL, Postmaster-General.

“Accepted, on condition that his contracts be complied with.”

AMOS KENDALL.

Porter's draft was unconditionally accepted. It was discounted by the defendants, upon his indorsement. The bank became the holder of it, for valuable consideration, and its right to charge the United States with the amount cannot be defeated by any equities between the drawer and the post-office department, of which the bank had not notice.

When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility, of individuals who are parties to such instruments. We know of no difference, except that the United States cannot be sued. But if the United States sue, and a defendant holds its negotiable paper, the amount of it may be claimed as a credit, if, after being presented, it has been disallowed by the accounting officers of the treasury; and if the liability of the United States upon it be not discharged by some of those causes which discharge a party to commercial paper, it should be allowed by a jury as a credit against the debt claimed by the United States. This is the

privilege of a defendant, for all equitable credits given by the Act of March 3, 1797 ;¹ 1 Story, 464. This, and the liability of the United States, in the manner it has been stated, has been repeatedly declared, in effect, by this Court. It said, in the case of the United States *v.* Dunn, 6 Pet. 51, "the liability of parties to a bill of exchange, or promissory note, has been fixed on certain principles, which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and cannot now be departed from." From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be, in maintaining these principles.

It was held in the case of the United States *v.* Barker, 4 Wash. C. C. 464, that the omission of the secretary of the treasury, for one day, to give notice of the dishonor of bills, which were purchased by the United States, discharged the drawer. And this Court said, when that case was brought before it, there was no right to recover, on account of the neglect in giving notice after the return of the bills. 12 Wheat. 561. That, and other cases like it, show how rigidly those principles have been applied in suits on bills and promissory notes, in which the United States was a party. The acceptance of Porter's draft was unconditional, and there is nothing in the evidence to discharge the acceptor. There is neither waiver, express or implied, of his liability. There was no understanding nor communication concerning it between the bank and any officer of the post-office department, before it was discounted. The bank advanced the money, which it was the object of the bill to obtain. It cannot be doubted, the acceptance was given for that purpose. The want of consideration, then, between the drawer and the acceptor, can be no defence against the right of the indorsee, who gave a valuable consideration for the bill.

It does not matter how the drawer's account stood. Whether he was a debtor or a creditor of the department ; whether the bank knew one or the other. An unconditional acceptance was tendered to it for discount. It was not its duty to inquire how the account stood, or for what purpose the acceptance was made. All it had to look to was the genuineness of the acceptance, and the authority of the officer to give it. The rule is, that a want of

¹ 1 Stats. at Large, 512.

consideration between the drawer and acceptor is no defence against the right of a third party, who has given a consideration for the bill, and this even though the acceptor has been defrauded by the drawer; if that be not known by such third party, before he gives value for it.

The evidence then, concerning Porter's account, was immaterial and irrelevant to the issue. It cannot affect the rights of the bank, and did not lessen the obligation of the department to pay the acceptance when it became due.

But the evidence does not show that any thing was due by Porter when the draft was accepted, or when it came to maturity. Mason, the witness, says, "that in the interim a sufficient sum had been raised and carried to the credit of Porter, to pay the draft; but that he had also, within the dates, been charged with the amount of a draft, drawn upon him by the postmaster at Mobile, accepted by him, which draft was payable in 1833, and that he was charged with failures and forfeitures incurred as contractor, in 1833; which charges were made by order of Mr. Barry, then postmaster-general. It was certainly right to debit Porter with these charges, if they were due by him; but that did not change the relative rights and obligations of the bank and the department upon his bill. If either are to lose by Porter, shall it be that party, who was bound to know the state of the account, before it gave an unconditional acceptance, for the purpose of accommodating its own agent; or the other, who placed faith in the acceptance, advanced the money upon it, which it was intended to raise; and who could not have learned what was the state of Porter's account, as it is proved that the charges which it is now said should have priority of payment over the bill, were not made against Porter until after his bill had been accepted? Certainly, the loss should fall upon the first. It cannot be otherwise, unless it be affirmed that an acceptor may claim to be discharged on account of his own negligence, and that, having induced a third party to advance money upon his acceptance, he shall be permitted to intervene between himself and the indorsee of the paper, a debt due to him by the drawer. The evidence offered to invalidate this credit was done from ignorance of the legal consequences incurred by such an acceptance. In such a case, the bank rightfully looked to the United States for payment of this bill; and if Porter owes any thing for forfeitures incurred as contractor, or on account of the Mobile draft, the United States must look to him.

There is no proof on the record, however, of any thing being due by Porter on those accounts ; and we do not intend to express any opinion upon his liability, or the rights of the United States, in respect to them one way or the other.

What are the merits of the case upon Reeside's drafts ?

They were drawn on the postmaster-general, at ninety days, payable to the order of the drawer, and were to be charged to his account for transporting the mail. They were "accepted on condition that his contracts be complied with." This is of course as binding as an absolute acceptance, if the condition has been performed.

What is the proof of performance, and how shall this conditional acceptance be construed ? Mason, the witness, says : "Reeside, in fact, performed the services for which he was contractor, in the year 1835 : and the money which he earned upon his contracts was applied, to an extent exceeding the amount due upon his drafts, to the extinguishment of balances created against him by recharging him with sums of money which had been allowed to him by Mr. Barry, the former postmaster-general, as contractor for carrying the mail, by giving him credit therefor in a general account current on the journal, but not entered in the ledger, where his account remained unsettled when the present postmaster-general came into office." It is said, this does not cover the condition of the acceptance, because Reeside stipulated, by his bond, to pay forfeitures, and repay advances ; and that he owed the department on both accounts, when these acceptances were given : and that in this sense his contracts were not complied with. If this be so, in one sense the contracts would not be complied with : but is that the construction which should be put upon such a condition, when the subject-matter to which it relates is considered ?

If one purpose making a conditional acceptance only, and commit that acceptance to writing, he should be careful to express the condition therein. He cannot use general terms, and then exempt himself from liability, by relying upon particular facts which have already happened, though they are connected with the condition expressed. Why ? Because the particular fact is of itself susceptible of being made a distinct condition. This case furnishes as good an illustration of the rule as any other can do. Instead of the words being used, "accepted on condition that his con-

tracts be complied with," could it not have been as easily said, accepted on condition that forfeitures already incurred shall be paid, and that advances made shall be refunded? This would have conveyed a very different meaning; and would have put the bank, when the drafts were offered to it for discount, on inquiry. If they had been discounted without inquiry, it would have been done at the risk that the earnings upon the contracts, and such as might be earned between the date of the acceptances and the times of payment, would be enough to pay forfeitures, repay advances, and to take up the bills. It matters not what the acceptor meant by a cautious and precise phraseology, if it be not expressed as a condition. And when we are told, as we are in this case, by the person making these acceptances, that the form of words was devised expressly for that purpose, meaning for the purposes of having forfeitures paid and advances refunded, and to avoid promising to pay any thing to the order of contractors so long as any thing should be due from them to the department, we think it will be admitted that the purpose explained is larger than the condition expressed. And from the passage in the evidence just cited, how just does the rule appear which has been laid down by the Court, that, in the case of acceptances of commercial paper, that which can be made a distinct condition must be so expressed; nor can any thing out of the condition be inferred, unless it be in a case where the words used are so ambiguous as to make it necessary that parol evidence should be resorted to to explain them. Then the *onus* of proof would be on the acceptor, and the proof would be of no avail if the holder or any person under whom he claims, took the bill without notice of such conditions and gave a valuable consideration for it. The error in this case arose from the acceptor supposing that the defendants did know, and if they did not, they were bound upon such an acceptance to inquire into the stipulations and conditions of Reeside's contracts before they discounted the bills; and it is said they did not use "due diligence to acquire information." The objection then implies that information of these forfeitures and advances could have been given, and that it was not given when these acceptances were made. This makes it, then, a question of due diligence between the acceptor and the defendants, as to his obligation to communicate what he knew; and their want of caution in not making the inquiry.

We think it will be conceded to be a general principle, that one having knowledge of particular facts upon which he intends to rely to exempt him from a pecuniary obligation, about to be contracted with another, of which facts that other is ignorant, and can only learn them from the first or from documents in his keeping, that the fact of knowledge raises the obligation upon him to tell it. This would be the law in such a case, and it is in this case. Inquiry by the defendants would, at most, have resulted in obtaining what was already known to the acceptor. He held the contracts; he knew, or should have known, officially, the state of the accounts between the contractor and the department; and when he conditionally accepted his drafts, which were to be charged to his account for transporting the mail, as his liability to pay them would occur in ninety days, it was but reasonable that he should have said, in plain terms, when giving his acceptances: "If the earnings of the contractor from this time to the maturity of the draft, shall be sufficient to pay what he owes, and the debt he may incur until then, then these drafts will be paid." This would have been a condition about which there would have been no mistake.

But, further, if two persons deal in relation to the executory contracts of a third, as these contracts were, and one of them being the obligee induces the other to advance money to the obligor, upon "condition that his contracts be complied with;" and he knows that forfeitures have been already incurred by the obligor, for breaches of his contract, and does not say so; shall he be permitted afterwards to get rid of his liability, by saying to the person making the advance: "I cannot pay you, for when I accepted there was already due to me from the drawer of the bill more than I accepted for. I had knowledge of it then, and so might you have had if you had made the inquiry, but you did not choose to inquire; so I will pay myself first, because my acceptance was on condition that his contracts be complied with."

Such is the case before us as it was presented by the argument; and we cannot doubt it will be thought decisive that it was the duty of the acceptor, in this instance, to communicate what he knew of Reeside's account, if he had any conversation with the defendants before the drafts were discounted, and that it was not the duty of the defendants to inquire. It cannot be answered by saying the words of the acceptance were intended to provide for

what might exist, but what was not then known, or for breaches of the contracts which had already occurred, but which had not been charged with a penalty; for either would be an admission that inquiry by the defendants when the acceptances were made, could not have resulted in getting the information at the department.

But, again, will the terms of the acceptance admit in any way of retroactive construction? The words must be taken according to the ordinary import of them. They are "accepted on condition that his contracts be complied with." Can there be compliance with an executory contract, but in future, if breaches have already happened? Supposing no breaches to have occurred, necessarily implies such as may occur in future, and subsequent compliance. If both past and future breaches, then, are, as contended for, to be comprehended within the condition of this acceptance, why may not the condition be extended to such as may happen after the maturity of the drafts, as well as to such as had occurred before they were accepted? A literal interpretation must lead to both, and that will not be contended for. But the argument is, that the defendants should have inquired into the "stipulations of the contracts and the extent of the condition:" and it is said: "The bank would have been informed that the department expected Mr. Reeside to renew his drafts until the accumulation of his current pay would be sufficient to meet them; and had his pledge to take them up himself, if earlier payment should be required." Be it so. Can there be a plainer admission than there is in the preceding sentence, written by the acceptor, that it is necessary to go out of the condition of the acceptance to ascertain his meaning, and that his construction rests upon facts, known by himself and Mr. Reeside, which the defendants could not have known but from one or the other of them? — facts out of the condition, and which could alone become a condition by being so expressed. Again, it is taken for granted in the argument, if the defendants had inquired into the stipulations of the contract and the bond, that they would have been informed of the forfeitures which had been incurred. But that would not follow. Before such knowledge could have been obtained, it would have been necessary to take one step further beyond the condition, an inquiry into the accounts. Where shall such construction stop, if it be allowed at all? The law does not permit a conditional acceptance to be construed by any

thing extraneous to it, unless where the terms used are so ambiguous that it cannot be otherwise ascertained.

We will suppose, however, that the stipulations of Reeside's contract, and his bond, had been known to the defendants. Might they not very justifiably have concluded that his drafts were accepted to aid him with an advance to fulfil his engagements? The bond in evidence shows that a necessity for advances was contemplated. It had been the habit of the department to make them to contractors. Its exigencies, it is said, required advances to be made. The witness, Mason, says: "From the year 1830 the pecuniary affairs of the department were much deranged, and it was frequently unable to pay debts due by it to contractors. Under such circumstances, the department was in the practice of giving to contractors acceptances for sums less than was actually standing to their credit, unconditionally; and such acceptances were always taken up at maturity, prior to May, 1835. That occasionally, and with the special approbation of the postmaster-general, acceptances were given upon the faith of existing contracts, conditional upon the performance of the contracts, which were understood to become absolute, if the contractor performed the services stated in the contract." The defendants, in the year 1835, held acceptances of the same character for more than \$70,000, all of which were under protest for non-payment, but subsequently paid prior to the institution of this suit, except those in dispute in this case. The witness further says, the Bank of the Metropolis and other banks in the city of Washington and elsewhere, have been, for many years, in the practice of discounting such acceptances. That it was often done for the accommodation of the department, often for the accommodation of the drawer, and frequently of both. This testimony brings the department and the bank in connection upon acceptances of the former for contractors; shows the course of business upon them; and aids to give a proper construction to the acceptances under consideration. When it is remembered, also, that these acceptances were given to renew others of the department which were overdue, we think it cannot be doubted that the terms "accepted on condition that his contracts be complied with," cannot retroact to embrace forfeitures which had been incurred, and to refund advances said to have been made before the date of these acceptances. The argument upon this point was made upon the false assumption that there had been a communica-

tion between the postmaster-general and the defendants concerning these acceptances, before they were discounted; or that there was an obligation upon the part of the defendants to make an inquiry into the state of Reeside's contracts, and his fulfilment of them, because the acceptances were conditional. It did not exist here, nor does it in any case of a conditional acceptance. The acceptor is bound by his contract as it is expressed, and so it may be negotiated without any further inquiry.

Having fully canvassed the argument upon the point of the obligation of the defendants to inquire into the condition of the acceptance, we turn, for a moment, to the case as it is shown to be by the evidence.

Reeside's earnings between the date of the acceptances and the time for the payment of them, were not applied to pay forfeitures, or refund advances. They were exhausted by recharging him with sums of money which Mr. Barry had allowed to him as contractor for carrying the mail, which were credited in the journal, but not entered into the ledger. That they were not posted, cannot affect Reeside's right to such allowances; and something more must appear than the testimony in this case discloses, before it can be admitted that credits, given by Mr. Barry, were legally withdrawn by his successor. There is no evidence in this cause to impeach the fairness and legality of the allowances credited by Mr. Barry; no proof that Reeside had incurred forfeitures, or that advances had been made to him. Proofs should have been given, if it was intended to justify the recharges for the causes stated. No attempt was made to do so. The allowances, then, are credits in Reeside's account, which the defendants may use to prove his performance of the conditions of the acceptance; and they do show performance, as the amount earned would have paid his drafts if it had not been diverted.

The third instruction asked the Court to say, among other things, if the credits given by Mr. Barry were for extra allowances, which the said postmaster-general was not legally authorized to allow, then it was the duty of the present postmaster-general to disallow such items of credit. The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department. This right in an in-

cumbent of reviewing a predecessor's decisions, extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor. A third party is interested, and he cannot be deprived of a payment on a credit so given, but by the intervention of a court to pass upon his right. No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute, and it may be done by the direction of the incumbent of the department. The Act of July 2, 1836,¹ entitled "An Act to change organization of the post-office department," is only affirmative of the antecedent right of the government to sue, and directory to the postmaster-general to cause suits to be brought in the cases mentioned in the 17th section of that Act. It also excludes him from determining finally any case which he may suppose to arise under that section. His duty is to cause a suit to be brought. Additional allowances the postmaster-general could make under the 43d section of the Act of March 3, 1825,² 3 Story, 1985; and we presume it was because allowances were supposed to have been made contrary to that law, that the 17th section of the Act of July 2, 1836, was passed. In this last, the extent of the postmaster-general's power in respect to allowances, is too plain to be mistaken.

We cannot say that either of the sections of the Acts of 1825 and 1836, just alluded to, covers the allowances made by Mr. Barry to Reeside. But if the postmaster-general thought they did, and that such a defence could have availed against the rights of the bank to claim these acceptances as credits in this suit, the same proof which would have justified a recovery in an action by the United States, would have justified the rejection of them as credits, when they are claimed as a set-off.

We pass to the credit claimed, and called E. F. Brown's over-

¹ 5 St. at Large, 80.

² 4 id. 114.

draft. But why it is so called we do not know ; for certainly no overdraft occurred when he checked alone upon the contingent fund of the department deposited to his credit in the bank. \$7070.24, on the 30th April, 1835, were deposited to his credit. By 7th June, he had drawn of that sum \$3076.97. Then the postmaster-general directed the bank not to pay Brown's checks, unless they were approved by Robert Johnson, the accountant of the department. It is in proof that no check of Brown's was afterwards paid without Johnson's approval. On the 2d December following, the original deposit to Brown's credit was drawn out in his checks, approved by Johnson, and it was found there had been an overdraft of something over \$600. We do not say that an overdraft out of the bank, by authorized officers of the United States, is in any case chargeable to the United States, unless it can be shown that the money overdrawn has been applied to the use of the United States ; but, in the present instance, we think no proof of such application was necessary, and we cannot resist the conclusion that the defendants are in equity entitled to this credit ; for the proof is, that on the day that the overdraft was known, the postmaster-general wrote a letter to the cashier of the bank, stating that " the contingent fund of the department was exhausted, but the public service requires that a number of bills chargeable to that appropriation, shall be paid sooner than the usual sums can be obtained from Congress ; I therefore request the favor of your bank to pay such bills against the department of that character as may be presented, with the certificate that the amount is allowed, signed by Robert Johnson, accountant of this department." The request was complied with, and the bank advanced, until the 14th May, 1836, more than \$6000 to pay claims on the contingent fund. In this case, as in those of more humble dealings, the course of business between parties must be used when it can apply to explain their understanding of past transactions. Nor can the inference be resisted that, when the postmaster-general discovered the contingent fund had been overdrawn, and requested that other overdrafts might be made on the same account, that it was an admission of the correctness of the first. We think, then, that the United States was a debtor to the defendants for Porter's draft, and Reeside's drafts, and for the overdraft on the contingent fund, principal, interest, and costs.

But it is said, though the credits claimed by the defendants

shall be found to be due by the United States, they cannot be set off in this suit. This was the first instruction asked, and refused by the Court.

It is urged that, to allow them as credits in this suit is, in effect, to permit money to be taken from the treasury, otherwise than it is directed to be disbursed by law. That the money previously held by the defendants, had been passed to the account of the treasurer of the United States by direction of the postmaster-general, in conformity with the Act of July 2, 1836. 4 Story, 2464. That when the defendants complied with the letter of instruction, written to them by the postmaster-general, on the 16th July, 1836, and transferred the money then on deposit to the credit of the department, to the treasurer of the United States, for the service of the post-office department, and when they consented to receive future deposits according to a form sent, and to transact the business according to the regulations contained in the letter of the 16th July, 1836, that the defendants cannot legally charge their claims against that account, by way of set-off in this suit.

To the foregoing objections, a brief but conclusive answer may be given. That is certainly the treasury of the United States, where its money is directed by law to be kept; but if those whose duty it is to disburse appropriations made by law, employ, or are permitted by law to employ, either for safe-keeping or more convenient disbursement, other agencies, and it shall become necessary for the United States to sue for the recovery of the fund, that the defendant in the action may claim, against the demand for which the action has been brought, any credits to which he shall prove himself entitled to, if they have been previously presented to the proper accounting officers of the treasury, and been rejected. Such is the law as it now stands. This right was early given, by an Act of Congress, to all defendants in suits brought by the United States. 1 Story. It has been repeatedly before this Court. The decisions upon it need not be cited. They apply to this case. The transfer of the deposit to the treasurer of the United States; the letter of the postmaster-general, directing it to be done; his regulations for keeping the account, and for disbursing it, were directory to the defendants; and their compliance with such directions was an acknowledgment that the postmaster-general had the right to give them, as the conditions upon which they were to con-

time the depository of the fund. But it cannot be inferred, either from the Act of July 2, 1836, requiring that when the revenues of the post-office department have been collected, that they shall be paid, under the direction of the postmaster-general, into the treasury of the United States; or because appropriations for the service of the department shall be disbursed by the checks of the treasurer, indorsed upon warrants of the postmaster-general, and countersigned by the auditor for the post-office department, under the words "registered and charged;" or from the declaration in the postmaster-general's letter to the defendants, that no other credit, set-off, or deduction will be admitted in this account. It cannot be inferred that the defendants accepted the postmaster-general's letter as a contract to surrender the right secured to them by the statute, to claim credits in a suit brought against them by the United States; or that it imposed upon them any legal obligation not to do so.

From the previous and contemporaneous correspondence between the bank and the postmaster-general, concerning these drafts, it is clear such was not the apprehension of the defendant when the account was open with the treasurer of the United States, in compliance with the postmaster-general's letter. That was done in compliance with the law, changing entirely the fiscal arrangements of the department; and for that purpose the postmaster-general was the proper organ to direct it to be done; but any condition in that letter not required by the Act of Congress, under which he was acting, though officially made, is rather an evidence of what he wished to do, than a conclusion that he had the power to impose it, or that the defendants had consented to look to Congress for the reimbursement of the debt due them, and not to the courts of justice. When the account was changed to the treasurer of the United States, there was a large balance on deposit to the credit of the post-office department. The fund, however, was not the less that of the United States, in the one case or the other. The change, then, made no difference as to the ownership of the fund, in their right to retain, if the defendants had any right at all to retain it for their debt. They had been dealing with the executive branch of the government in a matter of money, and could not be turned to the legislature without their consent to ask it to do as a favor, what the judiciary could settle as a right. If the defendants had supposed such was to be the

consequence of carrying the fund to the treasurer's account, it is manifest, from the evidence in the case, that it would not have been done. That they did not do so, it is to be inferred also, from the evidence, arose from an indisposition to enforce a right until every effort had been made to obtain it by amicable adjustment; and from an indisposition to embarrass a department which had been severely pressed, and was then just beginning to be relieved. The postmaster-general says, in his letter of March 19, 1838, that, "excepting the refusal, in common with other banks, to pay the warrants of this department in gold and silver, or an equivalent, commencing in May last, and the seizure of both a general and special deposit of moneys in the treasury to meet alleged claims, under the circumstances exhibited in the annexed papers, the Bank of Metropolis has faithfully discharged its duties as a deposit bank for this department." The circumstances alluded to are those which have been the subject of comment in this case; and it is our opinion that they confirm the right of the defendants to the credits claimed. There was no error, then, in the Court not giving the instructions asked for, and the judgment is affirmed.

It is proper for us to say, however, if the law and the merits of the case were not with the defendants, that the Court might well have refused to give the first instruction, from the manner in which it is asked. After the evidence had been closed on both sides, the Court was asked to say, "that, upon the evidence aforesaid, the defendants are not entitled, in this action, to set off against the plaintiffs' demand, the amount of acceptances aforesaid, so given in evidence by the defendants, nor the amount of the overdraft of E. F. Brown." It raises all the issues, both of law and fact, in the case, and requires the Court to adjudge the case for the plaintiffs. This the Court could not do, as there were contested facts in the case, which it was the province of the jury to decide. The Court could only have said, alternatively, what was the law of the case, accordingly as the jury did or did not believe the facts: and this, it will be admitted, would have been equivalent to a refusal of the instruction. When instructions are asked, they should be precise and certain, to a particular intent; that the point intended to be raised may be distinctly seen by the Court, and that error, if one be made, may be distinctly assigned.

MORETON NEWHALL *et al.* v. JOSEPH W. CLARK.

(3 Cushing, 376. Supreme Court of Massachusetts, March, 1849.)

Conditional acceptance. — An acceptance of the following order is conditional : “ Please pay, &c., out of the amount to be advanced to me, when the houses I am now erecting on your land . . . are so far completed as to have the plastering done, according to our contract,” &c. And if the work was never done by the contractor (the drawer), under the contract referred to, the event never occurred upon which the defendant by his acceptance bound himself to pay. And it is immaterial that this contract was subsequently cancelled by the drawer and acceptor, if there was no fraudulent interference by the acceptor to prevent the completion of the work contracted for.

THE plaintiffs, as the payees, brought this action against the defendant, as the acceptor of two orders drawn on him by Henry M. Reed, for different sums, and of different dates, but in other respects of the same tenor. The declaration also contained the general counts for work and labor, money paid, &c., in common form. The following is a copy of one of these orders : —

“ BOSTON, June 22, 1844. J. W. Clark : — Please pay to Newhall & Maguire, or their order, one hundred and eighty-four dollars and sixty-six cents, out of the amount to be advanced to me when the houses I am now erecting on your land in Erie Street are so far completed as to have the plastering done, according to our contract, dated April 12, 1844, now on record, and charge it to my account. Yours, &c., respectfully,
HENRY M. REED.”

“ Indorsed : JOS. W. CLARK.”

The plaintiff contended, in the Court below, that the orders and acceptance were absolute ; and the defendant, that they were conditional. The presiding judge ruled this point in favor of the plaintiffs ; but considering the question doubtful, allowed them to proceed and introduce evidence to show, and the fact was admitted, that, on the 14th February, 1845, Reed, the contractor and drawer of the order, made an assignment to Rice and Jenkins of all his right in the contract, and that on the same day the contract was cancelled by Rice and Jenkins and the defendant.

The plaintiffs contended, upon this evidence, that if the orders were conditional, the defendant and the drawer having cancelled the contract, the defendant had thereby rendered himself liable absolutely, from the time of the cancellation ; and the presiding

judge so ruled. The defendant thereupon offered to show the following facts, by way of explaining and avoiding the effect of the cancellation : —

That the contract had expired by its own limitation, at the time of the cancellation ; that Reed had wholly failed to comply with the terms of the contract, and had released the premises to Clark ; that the work done by Reed was not done pursuant to the contract ; that he was utterly unable to complete the work, and that in February, 1845, the work was wholly suspended ; that this was well known to the plaintiffs ; and that the assignment was made in consequence of the utter inability of Reed to go on with and complete the contract.

This evidence, being objected to by the plaintiffs, was considered inadmissible by the Court, and rejected.

It was agreed that the plaintiffs worked upon the houses mentioned in the contract to the full value of the sums for which the orders were drawn, and on the faith of these orders.

Upon the facts in evidence, the presiding judge ruled that the plaintiffs could recover, and a verdict being returned accordingly in their favor, the defendant alleged exceptions.

SHAW, C. J. The Court are of opinion, that this verdict, under the instructions given, and the evidence offered, as appears by the bill of exceptions, cannot be sustained.

The plaintiffs declare in a general count for work and labor, money paid, &c., in common form, and also upon two orders, copies of which accompany the bill of exceptions. These orders are alike, and the same remarks will apply to both : “ Please pay, &c., out of the amount to be advanced to me, when the houses I am now erecting on your land, in Erie Street, are so far completed as to have the plastering done, according to our contract, dated,” &c. The orders refer to the contract subsisting between the parties, and necessarily call for evidence, beyond that of the orders themselves, to ascertain their meaning and legal effect, and to determine when and from what fund the sums mentioned in them are to be paid. They look to the future, to a certain quantity of work *to be done*, and materials supplied, by the drawer, for the use and benefit of the acceptor, according to contract. All future events are contingent ; all unaccomplished enterprises, intended labors and performances, fall within this category. The acceptance was

an agreement to the request expressed in the order, and as that was contingent, the acceptance was an undertaking dependent on the same contingency. That contingency was, *when*, or *if*, the work I have undertaken to do, shall have been completed to a certain stage, agreeably to our contract. If, then, the work was never done by the contractor, the drawer of the order, under and in pursuance of this contract, the event never occurred, upon which the defendant by his acceptance bound himself to pay. It follows, as a necessary consequence, that by force of the defendant's express promise, he was not bound to pay any thing. Payment was only to be made, at a time which never arrived ; and out of a fund of the drawer, to accrue by the performance of the contract, on the part of the drawer, which never being performed, the fund of course never existed.

The Court are therefore of opinion, that the direction of the Court was incorrect, in ruling that this acceptance was an absolute and unconditional promise for the payment of money.

But, for the purpose of presenting another question, the plaintiffs offered evidence to prove, that, on the 14th February, 1845, Reed, the drawer of the order, and the contractor with the defendant, made an assignment to Rice and Jenkins of all his right in the contract ; and that on the same day the contract was cancelled by Rice and Jenkins and Clark ; and of these facts there is no dispute.

Upon these facts, the Court ruled, at the instance of the plaintiffs, that if the order was conditional, the defendant, and the drawer, that is, as the evidence was, the assignee of the drawer, having cancelled the contract, the defendant had thereby rendered himself absolutely liable from the time of such cancellation.

This direction was, in our judgment, incorrect. By such cancellation, the condition on which the money was to be paid did not occur ; the work on the houses was not done by Reed, conformably to his contract, so as to bring the defendant's engagement within the terms of the order and acceptance ; and the defendant, therefore, did not become liable by the force of his acceptance.

We do not mean to say, that when a party has obtained such an order and acceptance, nothing short of an absolute performance of the contract, on the part of the contractor and drawer, will give the payee any remedy against the acceptor. The holder of such an order is a holder for value, and has an interest in the contract, and in its execution, as a means of raising the fund to which he has a

right to look for his pay. If, therefore, after the acceptance of such an order, the acceptor, without justifiable cause, should prohibit the drawer and contractor from proceeding to such a completion of the contract, as will make the acceptance payable, or if he should collude with the drawer of the order, to put an end to the contract, when, but for such fraudulent interference, the drawer would be able and ready to go on and complete it, we are not prepared to say that the holder of the order would not have a remedy by a special action, setting out such wrongful act of the acceptor, and the loss sustained by the holder by means thereof. The sum thus to be recovered would not be the debt due by force of the contract, that is, the acceptance, but damages for the wrongful act of the acceptor, in preventing the completion of the contract, by *means of which* the holder has sustained the loss of the debt. In such action, the burden of proof would be on the plaintiffs to show, that the prevention of the completion of the contract had been caused by the defendant, to avoid the order ; and any evidence, on the part of the acceptor, to show that the drawer had failed or been unable to perform his contract, by reason of death, sickness, insolvency, or other inability, would be competent to rebut the charge, upon which such action must be grounded.

But, even if the plaintiffs, under a count in *indebitatus assumpsit*, could be permitted to prove facts tending to show that the performance of Reed's contract, and the earning of the money from which the acceptance was payable, had been prevented by the defendant, of which we have great doubt, it must be done not merely by showing a cancellation of the contract, before its completion : but also that it was done without excuse or justification, on the part of the defendant, and that the drawer was competent and willing, and, but for such interference of the defendant, would have been able, to complete his contract : and thus to place in the defendant's hands the fund from which the acceptance was payable. In the present case, this must have been done by proof of facts *aliunde* ; and the evidence of facts, offered by the defendant, to explain and avoid the effect of these acts of the defendant in annulling the contract, to wit, that Reed had wholly failed to comply with the terms of his contract, &c., as stated in the bill of exceptions, would have been competent and material, and the rejection of such evidence by the Court was therefore incorrect.

Exceptions sustained, verdict set aside, and new trial granted.

A conditional acceptor is not liable if compliance is prevented by the operation of law. *Browne v. Coit*, 1 McCord, 408.

In this case the defendant accepted a bill upon condition that he should sell certain goods of the drawer in his hands, which goods were attached before the maturity of the bill and before they had been sold. The Court held that the defendant was not liable.

So if a merchant undertake to accept a bill on condition that a cargo of equal value be consigned to him, and the cargo consigned be not of equal value, he is not bound. *Mason v. Hunt*, 1 Doug. 297.

In *Wintermute v. Post*, 4 Zab. 420, the force of an acceptance "when in funds," came under consideration. "The term 'when in funds' literally means when the acceptor is in the possession of cash which the drawer has a present right to demand and receive or to appropriate by his bill, whether such funds be the product of labor or of commodities furnished, of goods sold or money deposited or collected, or any other source. And such, in my judgment, is its fair commercial and judicial construction." Per *Haines, J.* In this case S., a day laborer, drew on his employer, P. (to whom S. was indebted), in favor of the plaintiff. P. wrote upon the bill "accepted when in funds." S. continued to draw his wages as he earned them; and the Court held that it was not to be supposed that the parties meant that the pittance of each day's work should be withheld from the necessities of the laborer's family till they should accumulate to the amount of the bill. But if after such appropriation for the necessities of life a balance should be left in the hands of the acceptor, then his acceptance would become absolute, and he would be bound to pay, and not till then. *Id.* 424.

See *Campbell v. Pettengill*, 7 Greenl. 126, where it was determined, in construing the same expression, that available securities were not funds until actually converted into money. See also *Hunter v. Ingraham*, 1 Strob. 271; *Gallery v. Prindle*, 14 Barb. 186; *Owen v. Iglanor*, 4 Cold. 15.

And the burden of proof in such case is on the plaintiff, in an action against the drawer, to show funds in the hands of the acceptor. *Andrews v. Baggs, Minor*, 173. See *Owen v. Lavine*, 14 Ark. 389.

If the funds are not received in the lifetime of the acceptor, but are collected by his administrator, the latter is liable in his representative character upon the acceptance of the deceased. *Swansey v. Breck*, 10 Ala. 533.

In *Perry v. Harrington*, 2 Met. 368, it was held that an acceptance to pay a certain sum out of the first money received by the drawee, bound the acceptor to pay, from time to time, on reasonable request, such funds as he received of the drawer; and that a judgment for a sum which he had refused to pay was no bar to an action for a further sum received since the first action.

But the payee is not bound to receive a conditional acceptance. He may refuse, and protest the bill for non-acceptance. But if the plaintiff relies upon such acceptance, he must show that the condition has been performed. *Ford v. Angelrodt*, 37 Mo. 50; *Wintermute v. Post*, 4 Zab. 420, and other cases, *supra*.

Whether an acceptance at a particular place is a conditional acceptance, has been a subject of considerable conflict. In England, after several decisions to the contrary, it was finally decided in the House of Lords, in *Rowe v. Young*, 2 Brod. & B. 165; s. c., 2 Bligh, 391 (1820), that such an acceptance was con-

ditional, requiring the holder, in an action against the acceptor to aver and prove presentment at the place designated. This decision gave rise to the Stat. of 1 & 2 Geo. IV. c. 78, declaring that acceptance at a particular place shall not be considered conditional, unless the bill is payable at a designated place "only, and not otherwise or elsewhere."

In America, the doctrine generally prevails that in case of a note payable at a particular place, if the suit is against the maker, demand need not be averred; but if the maker was at the place designated at the proper time, and was ready and offered to pay the note, it is matter of defence to be pleaded and proved on his part. And the acceptor of a bill being regarded in the same light as the maker of a note, it follows that an acceptance at a particular place is not conditional, and presentment at that place need not be averred. *Wallace v. McConnell*, 13 Pet. 136, *ante*, 15; *Watkins v. Crouch*, 5 Leigh, 522; *Bowie v. Duvall*, 1 Gill & J. 175; *Ruggles v. Patten*, 8 Mass. 480; *Weed v. Houten*, 4 Halst. 189; *Mulherrin v. Hannum*, 2 Yerg. 81; *Wolcott v. Van Santvoord*, 17 Johns. 248; *Caldwell v. Cassidy*, 8 Cow. 271; *Fairchild v. Ogdensburgh, &c. R. Co.*, 15 N. Y. 337; *Fleming v. Potter*, 7 Watts, 380; *Brabston v. Gibson*, 9 How. 263; *Ripka v. Pope*, 5 La. An. 61; *McCalop v. Fluker*, 12 La. An. 551. But the rule is otherwise in Indiana. See *Alden v. Barbour*, 3 Ind. 414; *Palmer v. Hughes*, 1 Blackf. 328.

The law is different as to an indorser; he can require presentment at the place designated. See cases above cited. See also *State Bank v. Napier*, 6 Humph. 270; *Taylor v. Snyder*, and *Chicopee Bank v. Philadelphia Bank*, *post*, and note.

The following cases contain further examples of conditional acceptance: *Kellogg v. Lawrence*, Hill & D. 332; *Kemble v. Lull*, 3 McLean, 272; *Atkinson v. Manks*, 1 Cow. 691.

INDORSEMENT.

BROWN v. THE BUTCHERS' AND DROVERS' BANK.

(6 Hill, 443. Supreme Court of New York, May, 1844.)

Form of indorsement. — The following figures in pencil, on a bill of exchange, viz., “1, 2, 8,” in connection with evidence tending to show that the person who placed them there meant thereby to bind himself as an indorser, constitute a valid indorsement; though it also appeared that he could write.

BROWN, the defendant below, was sued as indorser of a bill of exchange, upon which he had placed the figures “1, 2, 8,” in pencil. It was in evidence that he intended thereby to bind himself as an indorser; though it was also proved that he could write.

NELSON, C. J. It has been expressly decided that an indorsement written in pencil is sufficient. *Geary v. Physic*, 5 Barn. & Cress. 234; and also that it may be made by a mark. *George v. Surrey*, 1 Mood. & Malk. 516. In a recent case in the K. B., it was held that a mark was a good signing within the statute of frauds; and the Court refused to allow an inquiry into the fact whether the party could write, saying that would make no difference. *Baker v. Denning*, 8 Adol. & Ellis, 94. And see *Harrison v. Harrison*, 8 Ves. 185; *Addy v. Grix*, ib. 504.

These cases fully sustain the ruling of the Court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend it to bind himself.

Judgment affirmed.

In 2 Parsons, Notes and Bills, 16, note, the doctrine of this case is questioned; but on the ground of the evidence, that the defendant intended to bind himself as indorser by the use of the figures, the decision seems to be satisfactory. If he thereby induced another party to take the bill, it is clear, both on principle and authority, that he would be precluded from setting up the defence

that his indorsement was not formal and valid. It is possible that, in an action against the maker of a note or acceptor of a bill thus indorsed by the payee, the unusual form of the indorsement might be considered as a circumstance of suspicion so strong as to repel the holder's claim; but even this is doubtful. See *George v. Surry*, 1 Moody & M. 516. However this may be, the case is very different where the action, as here, is against the party who made such indorsement,—the proof being that he intended to render himself liable as an indorser. It is, perhaps, to be inferred that the defendant had adopted this method of indorsement for some special and private reason; and if it was in proof that he was in the habit of thus indorsing paper, the case would be stronger still against him.

The case has never been questioned in the courts, and is cited as authority in *Palmer v. Stephens*, 1 Denio, 471, where it was held that, if one sign a note with his initials, *intending thereby to bind himself*, he is as effectually bound as if he had written his name in full. See *Merchants' Bank v. Spicer*, 6 Wend. 443, to the same effect. Also *Williamson v. Johnson*, 1 Barn. & C. 146; *Bank v. Flanders*, 4 N. Hamp. 239, 247, 248; *Rogers v. Coit*, 6 Hill, 322.

Vincent v. Horlock, 1 Camp. 442, is not in conflict with this view. In that case B wrote above the blank indorsement of A, the following: "Pay the contents to C." It was held that B was not an indorser, on the ground that he *did not intend* to render himself liable as such. The words quoted were not a substitute for his name as in the principal case.

In *Partridge v. Davis*, 20 Vt. 499, the payee of a promissory note wrote the following words upon the back of it: "I guaranty the payment of the within note. Isaac D. Davis." The Court held that the transaction amounted to an indorsement, rendering Davis liable upon demand and notice, to any subsequent holder, even though not the immediate assignee of the payee. To the same effect is *Leggett v. Raymond*, 6 Hill, 639; but *Bronson, J.*, in delivering the opinion of the Court, says that his own opinion, which is overruled, is that the contract is a guaranty, void under the statute of frauds for want of a consideration, and not negotiable so as to pass a title to any one except to the person to whom the promise was made. He distinguishes the case from *Ketchell v. Burns*, 24 Wend. 456, in that the defendants' contract (guaranty) in that case was to bearer, and therefore negotiable. In this case (24 Wend. 456), the defendant was held liable as the maker of a new note. The case was also distinguished from *Manrow v. Durham*, 3 Hill, 584, as the guaranty in this case was made to the plaintiff; whereas in *Leggett v. Raymond*, as in *Partridge v. Davis*, the plaintiff was a subsequent assignee, and not the party to whom the promise was made. The contract in *Manrow v. Durham* was: "We guarantee the payment of the within note." Signed by the defendants. It was held in legal effect a promissory note, importing a consideration. *Bronson, J.*, dissented, considering the promise as a guaranty, as he did that in *Leggett v. Raymond* afterwards. This case of *Manrow v. Durham*, will be found interesting as containing an able review of the early cases, both by *Nelson, C. J.*, in delivering the opinion of the Court, and in the dissenting opinion of *Bronson, J.* The later New York cases, however, substantiate the view taken by the latter. See *Waterbury v. Sinclair*, 26 Barb. 455; *Ellis v. Brown*, 6 Barb. 282; *Cottrell v. Conklin*, 4 Duer, 453; *Spies v. Gilmore*, 1 Comst. 321; *Hall v. Newcomb*, 7 Hill, 416; and such

a contract as that in *Leggett v. Raymond*, would now be considered a guaranty and nothing more. This shakes the authority of *Partridge v. Davis*; and it may be considered very doubtful whether a contract, such as the one in that case, can be held an indorsement. The early case of *Upham v. Princee*, 14 Mass. 14, held the same doctrine as *Partridge v. Davis*. See also *Riggs v. Waldo*, 2 Cal. 485; *Pierce v. Kennedy*, 5 Cal. 138. See *Indorsement by one not a party*, *infra*.

A written agreement to pay a note "as if by me indorsed," is an indorsement. *Pinnes v. Ely*, 4 McLean, 173.

It is most usual and proper to place an indorsement upon the back of the bill or note, in accordance with the literal import of the term; but this has been held not essential. It may be upon its face, upon a paper attached, and with pencil as well as ink. *Folger v. Chase*, 18 Pick. 63; *Geary v. Physick*, 7 Dowl. & R. 653; *Partridge v. Davis*, 20 Vt. 499.

If there is an intention so to indorse as to effect negotiation, the form of the writing is immaterial. *Ib.* 503; *Sanford v. Norton*, 14 Vt. 228; *Sylvester v. Downer*, *post*.

The result is, as stated by *Davis, J.*, in *Partridge v. Davis*, "that no prescribed formula need be observed to constitute an indorsement. It is governed, like the instrument on which it is made, by those liberal principles of construction which pervade all mercantile contracts, paying little attention to mere technical rules, but endeavoring to ascertain and carry into effect the real intentions of the parties to them."

JOHN B. CAMDEN *et al.*, Plaintiffs in Error, *v.* KENNETH MCKOY *et al.*, Defendants in Error.

(3 Seammon, 437. Supreme Court of Illinois, December, 1842.)

- * *Indorsement by one not a party.*—If one not a party to a promissory note place his name on the back thereof, the payee not having indorsed it, he is to be regarded as a guarantor, and not as maker or surety; and the holder has no authority to write over the name any thing which would render such person liable as an original promisor, in the absence of proof of intention.

THE case is stated in the opinion of the Court.

DOUGLAS,¹ J. This was an action of assumpsit, by the plaintiffs against the defendants, McKoy, Johnson, and Gray, as maker of a promissory note. McKoy and Johnson pleaded the general issue, which was joined, and Gray pleaded a former recovery, to which the plaintiffs demurred. Before any decision was had on the demurrer, the plaintiffs entered a *nolle prosequi* as to Gray,

¹ Stephen A.

and proceeded to trial against McKoy and Johnson. By agreement of the parties, a jury was dispensed with, and the matters of fact as well as law were submitted to the Court. The plaintiffs offered in evidence the following promissory note and indorsement: "Three months after date, I promise to pay J. B. and M. Camden & Co., or order, four hundred and eighty dollars, value received, without defalcation.

JOHN C. GRAY.

"January 26, 1838."

Indorsement.

"For value received, we jointly and severally acknowledge ourselves as securities of John C. Gray, for the payment of the within note at maturity.

KENNETH MCKOY,
JACOB JOHNSON."

The signatures of Gray, McKoy, and Johnson were all proven to be genuine, and the plaintiffs' counsel admitted that the names of McKoy and Johnson were written in blank on the back of the note, and that they wrote said indorsement over said signatures on the trial. Various witnesses were then examined for the purpose of ascertaining at what time, and under what circumstances, McKoy and Johnson indorsed said note; but the whole evidence left it extremely doubtful whether they placed their names on the back of the note at the time of its execution, or long subsequently; and there was no evidence showing that they were privy to, or participated in the consideration. The plaintiffs then offered to read said note in evidence, under a declaration charging said McKoy, Johnson, and Gray as joint and several makers of said promissory note, to which the defendants objected, and the Court sustained the objection; and the plaintiffs offering no other evidence, a judgment of nonsuit, and for costs, was entered against the plaintiffs.

The assignment of errors questions the decision of the Court, excluding the note from evidence, and entering the judgment of nonsuit. Supposing the names of McKoy and Johnson to have been indorsed upon the note at the time of its execution by Gray, it becomes necessary to inquire into the nature and extent of their liability, and especially whether they, in connection with Gray, are liable, as joint and several makers of the note.

The general rule is, that an indorsement in blank operates as

authority to the *bona fide* holder of the note to fill up the indorsement, by writing any thing over the signature which shall be consistent with the nature of the instrument, and the intention of the parties. Great difficulty and confusion have arisen in applying the rule to the peculiar state of facts existing in each case. Upon an examination of the various cases cited in the argument, and others to which I have directed my attention, I find many apparently contradictory decisions, which will render it necessary to review the leading cases, in order to arrive at a satisfactory conclusion.

*Herrick v. Carman*¹ was a case where one Ryan had executed his note to Carman & Co., and procured Herrick to indorse it in blank. Carman & Co. assigned the note to J. V. Carman, who sued Herrick, seeking to charge him on his indorsement. The Court held that as it did not appear that Herrick gave Ryan credit with Carman & Co., by indorsing the note, or that he was in any wise informed of the use to which Ryan meant to apply the note, it would intend that Herrick meant only to become second indorser, with all the rights incident to that situation; that the fact of his indorsing first, in point of time, could have no influence, for he must have known, and we are to presume he acted on that knowledge, that though the first to indorse, his indorsement would be nugatory, unless preceded by that of the payees of the note. The Court also says, had it appeared that Herrick indorsed the note for the purpose of giving Ryan credit with Carman & Co., he would have been liable to them, or any subsequent indorsers, and his indorsement might have been converted into a guarantee to pay the note, if Ryan did not, according to the decision of the Supreme Judicial Court in Massachusetts.² From this decision, it appears that the indorser was not liable, either as maker or guarantor, for the reason that it was not proven that the payees gave the credit to him at the time they received the note; and if that fact had been proven, he would have been responsible as guarantor, and not as maker of the note.

The case of *Herrick v. Carman*,³ was an action on the same note, and the Court decided that it could not be maintained, either in the names of the payees, or the assignees of the note.

In *Nelson v. Dubois*,⁴ the Court maintains the same doctrine, upon a case similar in all respects, except that the person who indorsed the note in blank, did so for the purpose of inducing the

¹ 12 Johns. 159.

² 3 Mass. 274.

³ 10 Johns. 224.

⁴ 13 Johns. 175.

payees to accept it, and part with their property in lieu of it. In delivering the opinion, Chief Justice *Spencer* says, the facts in that case (*Herrick v. Carman*) are the same as in this, with the difference only, that it did not appear that *Herrick* indorsed the note for the purpose of giving *Ryan* credit with *Carman & Co.* It was then, and still is, my opinion, that, had he done so, he would have been liable to them, or any subsequent indorsee, and that *Herrick's* indorsement might have been converted into a guarantee to pay the note, if *Ryan* did not. In the present case, it does appear clearly and affirmatively, that the plaintiff refused to sell the horse for which the note was given, on *Brundige's* (the maker's) responsibility, and that the defendant put his name upon the note as guaranty for *Brundige's* payment of it, when it fell due; and that but for the defendant's undertaking, as guaranty, the plaintiff would not have parted with his property.

The case of *Campbell v. Butler*,¹ was founded upon a state of facts precisely similar in all respects to the preceding one. One *Law* executed his note to *Butler*, and *Campbell* and *Harvey* indorsed their names on the back of the note, for the purpose of enabling *Law* to obtain from *Butler* a horse and wagon, in exchange for the note. *Butler* sued *Campbell* upon his indorsement, and on the trial filled up the blank indorsement as follows:—

“For value received, I undertake and promise to guaranty the payment of the money within mentioned, to the within named *James Butler*.
WILLIAM CAMPBELL.”

“*Per Curiam*: The question is, whether the plaintiff below was authorized to write such a contract over the names of the indorsers of the note, respectively, and can sustain an action upon that contract. According to the decision in *Nelson v. Dubois*, and as the law is recognized in *Herrick v. Carman*, we think the plaintiff had a perfect right to recover, as on an original undertaking to pay, by each of the indorsers, as guarantors of the note. The defendant in error is, therefore, entitled to judgment.”¹

The case of *Josselyn v. Ames*,² which was cited in *Herrick v. Carman*, was an action by the assignee against the assignor of a note. The facts disclosed in the pleadings and proofs are these: *Josselyn* held a note against *John Ames*, and demanded security upon it. *John* proposed his brother *Oliver* as surety, who was

¹ 14 Johns. 349, 351.

² 3 Mass. 274.

accepted; and accordingly, John executed a note to Oliver, who indorsed it in blank, and delivered it to Josselyn in lieu of the first note. Josselyn sued Oliver on his note, averring in his declaration, that "the said Oliver then and there promised the said Josselyn, to guaranty to him the payment of the contents of said note, on demand, and then and there, in consideration of the premises, promised the said plaintiff to pay him the contents of said note, agreeable to the tenor of the same," &c. The Court held that the blank indorsement did not authorize such an averment; but did authorize the following indorsement over the signature: —

"For value received, I undertake to pay the money within mentioned, to E. J."

I confess that I am unable to discover what principle this case does establish, for the reason that I can perceive no material difference between the averment in the declaration, which the Court held to be unauthorized by the blank indorsement, and the one dictated by the Court; and it seems the parties took the same view of it, for they immediately agreed to have judgment entered upon the declaration as it stood.

The case of *Ulen v. Kittredge*,¹ was upon a state of facts substantially the same as *Nelson v. Dubois*, and *Butler v. Campbell*. Ulen declared against Kittredge, who had indorsed the note in blank, as guarantor, and proved a parol agreement that he was to guaranty the payment in the event that the maker did not pay it by a certain time; and he recovered according to his averments and proof. The question there was, whether the indorsement was valid, as against the statute of frauds, and the Court says, we are of opinion that the defendant's signature on the back of the note, with the authority given by him to the witness to write over the signature a sufficient guarantee, and such guarantee being accordingly written by the witness, pursuant to such authority, may be considered as a memorandum signed by the party, within the intent of the statute, as fully as if it had been written in the defendant's presence, immediately after the signature.

In *Moies v. Bird*,² the action was brought by the payee against an indorser in blank, who was not in any other manner a party to the note; but there was proof, showing that the indorser had affixed his signature there in pursuance of an agreement between

¹ 7 Mass. 233.

² 11 Mass. 435.

the maker and the payee, at the time of the sale of the land, and the execution of the note. The defendant insisted, that if liable at all, he was only responsible as indorser; but the Court held that in consequence of the parol agreement, he was liable as original obligor.

Tenney v. Prince,¹ was a case where a person indorsed a note in blank, nine months after date, and three months before maturity, and the payee brought suit against the indorser, charging him as original promisor. The Court held that he could not be rendered liable in that capacity, nor in any other, unless the indorsement was based upon some new consideration, and then only as guarantor.

In *Sumner v. Gay*,² the plaintiff declared against the defendant, who had indorsed a note in blank, as maker of the note in the first count, and as guarantor in the second; and the suit was maintained; but it does not appear whether as maker or guarantor, nor was it material in that case, for the liability would have been the same.

Baker v. Briggs,³ was an action brought to recover the amount of a note made by Ryan to Baker, and indorsed in blank by Briggs. It appears, from the report, that one count charged Briggs as maker of the note; but we have no means of knowing in what character he was declared against in the other counts. The proof in the case shows that it was the understanding of the parties that he should be held responsible as surety, and the Chief Justice treats him as an original promisor.

It is worthy of note, that, in each of the preceding cases, the indorsement was in blank; the indorser was sued alone, unconnected with the maker; and in every one, where a recovery was had, there was proof showing, affirmatively, the understanding of the parties, and the nature of the transactions between them. There are two other cases in the Massachusetts Reports, which belong to a different class, and deserve attention.

The case of *Hunt (Adm'r) v. Adams*,⁴ was on a promissory note made by one Chaplin, to the plaintiff, with the following indorsement at the bottom:—

“I acknowledge myself holden as surety for the payment of the demand of the above note. Witness my hand.

“BARNABAS ADAMS.”

¹ 4 Pick. 385.

² 4 Pick. 311.

³ 8 Pick. 122.

⁴ 5 Mass. 358.

Adams was sued as surety in said note; and the Court decided that the suit was well brought, saying that the defendant is an original party to the contract, as well as Chaplin. The contract, in its legal construction, is a promise made, as well by the defendant as by Chaplin, for value received, to pay fifteen hundred dollars to plaintiff's intestate. To this promise Chaplin has signed as principal, and defendant as surety. This mode of signing is an accommodation between the promisors, by which the defendant is entitled, if he pay the note, to an indemnity from Chaplin; but as to the intestate, they must be considered as joint and several promisors. Again the Chief Justice says, the legal effect of a note in this form is not different from a note in the form of "I, A B, as principal, and I, C D, as surety, promise to pay, &c." This last form is not uncommon, and the promise has always been holden to be made by each as original promisor.

The other is the case of *White v. Howland*,¹ and is similar to this in the facts of the case, the form of the action, and the reasoning of the Court. These are distinguishable from all the other Massachusetts cases in this, that the indorsement was written out in full, and mutually agreed upon, by the parties, before signing. The terms of the contract, and the character and extent of the indorser's liability, were matter of agreement between the parties, and it only remained for the Court to execute that agreement according to its spirit and legal effect. If the indorser was liable as a joint maker of the note, in the capacity of surety, he became so in pursuance of the provisions of an agreement written and signed by himself, and not by virtue of a contract made for him, by the Court, or the construction of law, over a blank indorsement upon the back of a promissory note.

In *Dean v. Hall*,² the doctrine upon this subject is discussed with great learning and ability. The New York and Massachusetts cases are all reviewed by Justice Cowen, and the conclusion seems to be, that the indorser cannot be charged as maker unless there are some peculiar circumstances arising out of a promise to become originally and directly responsible, or a participation in the consideration for which the note was given. In fact, such a state of case was shown, by proof, to exist in *Nelson v. Dubois*, and *Campbell v. Butler*, and, indeed, in all the New York cases where the indorser in blank was held responsible as guarantor;

¹ 9 Mass. 314.

² 17 Wend. 214.

and for the want of such evidence, it was held, in *Herriek v. Carman*, that the indorser was not liable, either as maker or guarantor.

Besides the absence of any evidence connecting McKoy and Johnson with the original consideration of the note, the case under consideration differs from those referred to, or any I have been able to find in the books, in one essential particular. Here the makers and indorsers are sued jointly, as makers of a joint and several promissory note. In each of the others, the suit was against the indorser alone; and I have been able to find no case in which the maker and indorser were joined in one action. This difference becomes important, for the reason that in most, if not all the cases, except *Moies v. Bird*, where the indorser has been held to be an original promisor, the declaration contained counts charging the defendant as guarantor, as well as maker; and the language of the Court usually is, that he is responsible as original promisor or undertaker, without distinguishing between maker and guarantor.

In those cases it was not material in which character the defendant was responsible, as the effect would have been the same, as it regards the form of the action, and the extent of the liability. If, then, this question is to be determined upon the weight of authority, we do not feel authorized, in the absence of any testimony showing the understanding of the parties, to treat McKoy and Johnson as joint and several makers of the note with Gray. Aside from authority, and relying upon general principles, the question is, in our opinion, free of difficulty. Whilst the law requires no particular form of words to constitute a promissory note, and designates no particular place at which the owner shall affix his name, in order to establish his liability in that capacity, yet, by the universal consent and acquiescence of commercial and business men, custom has established and sanctioned a form and mode of signing, which furnish a legal presumption of the intention of the parties, and the precise character of the liability attaching to the signature, which presumption may, in many cases, be rebutted by parol evidence. For instance, a signature at the bottom of a note, on the right-hand side of the paper, is *prima facie* evidence that it was affixed there in the character of maker, whilst the same signature, at the left-hand side of the paper, would furnish equally satisfactory evidence that it was placed there only

as a witness to the instrument. So the signature of a third person, upon the back of a note, after the payee has indorsed it, is evidence of a contract to become responsible as second indorser. If custom has ripened into the form of legal presumption, in these respects, it would seem to follow, that a departure from this custom would negative such presumption, and furnish *prima facie* evidence of a different kind of liability. The authorities are not definite and conclusive as to the technical character of this liability; yet their general tendency, as well as the nature of the transaction, lead us to the conclusion that it amounts to a guaranty.

Upon the ground of variance, the note was clearly inadmissible in evidence. The note declared on purported to be made and signed by McKoy, Johnson, and Gray, and the note offered in evidence was signed by John C. Gray alone, and indorsed by McKoy and Johnson, with implied authority to write a guaranty over the signatures. Upon the well-settled principle, that the pleadings and proofs must correspond, the note was properly rejected.

In this case, it is unnecessary to inquire whether the plaintiffs, after entering a *nolle prosequi* as to Gray, could proceed to trial and judgment against the other defendants.

The judgment is affirmed.

CATON, J., dissenting. I regret that I feel compelled to disagree with a majority of the Court in this case. After a careful examination of the authorities and general principles applicable to the main questions involved, I am constrained to the conclusion, that where a name is found on the back of a promissory note in the hands of the original payee, the presumption of law is, in the absence of proof on the subject, that it was put there at the time of the making of the note, and as part of the original transaction. In the case under consideration, the proof is so entirely uncertain and unsatisfactory, that it leaves the mind without a bias or inclination one way or the other, and the law is left to raise its own presumption on the subject. The name on the back of a note, while in the hands of the original payee, does not make the writer, in a technical sense, an indorser. He cannot be the first indorser, because he is not the payee of the note, nor can he be a second or any subsequent indorser, because his

indorsement is not preceded by the name of the payee. The very term indorser presupposes that the note, either is, or has been negotiated. The defendants, then, cannot be treated as indorsers of this note. Then for what purpose were the names put on the back of it? Not being indorsers, it was not for the purpose of giving the note negotiability, but must have been for the purpose of increasing the payee's security; and if this was the object, there is nothing unreasonable in presuming that the security was required and obtained, at the time the note was given. This security was required because the payee was not satisfied with the responsibility of the maker of the note. If this responsibility of the defendants was undertaken at the time the note was given, then no new consideration was necessary to make their undertaking obligatory on them, because the presumption of law is, that it was a part of the original contract between the plaintiff and Gray, that this security should be given. By presuming that this indorsement (and I use the term not in its technical sense) was made at the time the note was given, and was a part of the original contract, we give effect and efficacy to the acts of the defendants. If we do not presume that the undertaking was made at that time, we let go every thing like certainty, and determine without any fixed principle or certain rule. If we determine that it was made after the execution and delivery of the note, and on a new arrangement, it would be an undertaking on the part of the defendants to pay the pre-existing debt of Gray, which, by the statute of frauds, must be in writing, on a good consideration. By adopting the construction which I give, a manifest embarrassment is avoided, and the evident intent of the parties is carried into execution: and unless we do adopt that construction, we shall, in most instances, discharge the liabilities of such sureties altogether. Unless the presumption of law is that such an indorsement was made at the same time with the note, we must presume it was made afterwards: and if we do this, we determine that the act was *prima facie* void, because we make it a new and independent transaction, unconnected with the consideration of the note, and requiring a new consideration to be proved to support it. But I do not understand the opinion of Mr. Justice *Douglas*, to determine that the presumption of law is, that the names of the defendants were written on the note after its execution. But in the absence of all proof on the subject, the law must determine at what time this undertaking was entered into by the defendants, whenever

that question of time becomes material, as it most unquestionably does in a case like this. It will not be denied, I presume, that if it were proved by testimony on the trial, that the defendants wrote their names on the back of this note, at the time the note was made, it would all be considered one transaction, and supported by the same consideration, and their liability would be fixed ; while, on the other hand, if it were proved that their names were not put there till afterwards, it would be a new and independent undertaking, to support which the plaintiff must prove a new consideration. I think, then, that the Courts of New York and Massachusetts, in determining, in the absence of all proof on the subject, in cases like the present, that the indorsement was made at the time the note was made, and for the same consideration, have adopted a sound and salutary rule, perfectly consistent with the general principles of law, and, in fact, the only one that can secure to the parties, in many, if not in most instances, the rights and liabilities intended by them ; and against this I have been unable to find a solitary decision or *dictum*.

If I have not failed, then, in what I have been attempting to show was the time and consideration of this indorsement, then it was competent for the payee to write any agreement over the names of the defendants, consistent with the nature of the instrument, and the agreement of the parties ;¹ and when this is done, the parties are liable on that agreement, in the same way that they would have been, had they filled up the indorsement themselves, at the time.

The inquiry now is, what was the nature of the liability they intended to assume ? This, too, in the absence of all proof on the subject, the law must determine, from the nature of the case, and the circumstances of the transaction ; while, if there is any satisfactory proof, that must control and determine the nature and extent of the liability. I have already said that the defendants here cannot be considered indorsers, because the paper was never put in circulation,² but has always remained in the hands of the original payee, to whom alone the defendants are liable, if they are liable at all, and to whom an indorser can never be liable, where, as in this State, a note can only be put in circulation by indorsement. The payee of a note here must be the first indorser ; and he, as first indors-

¹ Chitty, Bills, 257, note 1 ; Josselyn v. Ames, 3 Mass. 274, and cases there cited ; Beckwith v. Angell, 6 Conn. 315.

² Chitty, Bills, 44.

er, must stand between all subsequent indorsers and danger ; so that here, if we treat the defendants as indorsers at all, they are second and third indorsers, so that, instead of their being liable to the payee, he in fact might become liable to them. The liability of an indorser is only conditional ; while I presume it will hardly be doubted, the liability these defendants intended to assume was absolute. If I am not mistaken in the presumptions which the law raises, then the nature of the defendants' liability is precisely the same as if it had been proved, on the trial, that the defendants and Gray put their names to this paper at the same time, and for the purpose of increasing the plaintiffs' security, and that in consideration of their becoming such security, the plaintiffs gave the credit, which, without their names, might not have been given. Upon such a state of facts I hold, and upon the authority of the cases referred to in the opinion of the majority of the Court ; that these defendants became original joint and several promisors with Gray, for the payment of the sum of money in this note mentioned, and that their agreement with the plaintiffs was absolute, that the money should be paid as in the note expressed ; and, in pursuance of such understanding, the plaintiffs were authorized to write an agreement over the defendants' names, so as to charge them either as guarantors or as sureties ; this being perfectly consistent with the nature of the instrument, and the agreement of the parties, which was that their responsibility should be absolute, for the payment of the money, and not conditional, as it would have been, had they been technical indorsers. In this case, then, I hold that the plaintiffs had a right to fill up this contract as they have done ; to wit, " For value received, we jointly and severally acknowledge ourselves as securities of John Gray, for the payment of the within note at maturity." The plaintiffs having chosen, as they had a right to do, to treat the defendants as sureties to this note, the authorities clearly establish that they are liable as joint and several makers of the note, precisely the same as if the note had read, " We jointly and severally promise to pay, the first as principal, and the other as sureties," &c., and their names had all been put to the bottom of the note.

It is said, however, that this case is distinguishable from any of the cases to which reference has been made, in this, that, in the case before us, the principal and sureties were all charged in the same suit, whereas, in all the other cases, where the person, whose

name is found on the back of the note, has been treated as original maker of the note, he has been sued separately. But this, I submit, can make no difference in principle, and is attributable rather to accident than necessity. If all can be treated as joint and several makers of the note, there is certainly no reason why all may not be sued jointly, and the sureties surely ought not to object that their principal is joined with them. But at the time this note was offered in evidence, and rejected by the Court, Gray was not a party to the suit. The Court had permitted the plaintiffs to dismiss their suit as to him, and proceed as to the present defendants, so that, if the Court was correct in permitting this to be done, the suit then stood precisely as if Gray had never been made a party to it.

A majority of the Court differing with me in opinion on this question, I have deemed it unnecessary to examine the question, whether the Court below was correct in allowing the plaintiffs to discontinue as to Gray, and proceed as to the other defendants; while this would have been an important inquiry, had a majority of the Court been with the plaintiffs on the other points.

Judgment affirmed.

This case has been followed in Illinois by *Cushman v. Dement*, 3 Scam. 497; *Carroll v. Weld*, 13 Ill. 682; *Klein v. Currier*, 14 Ill. 237; *Webster v. Cobb*, 17 Ill. 459. See also *Watson v. Hurt*, 6 Gratt. 633; *Clark v. Merriam*, 25 Conn. 576; *Perkins v. Catlin*, 11 Conn. 213; *Beckwith v. Angell*, 6 Conn. 315; *Ranson v. Sherwood*, 26 Conn. 437; *Schollenberger v. Nehf*, 28 Penn. State, 189; *Fegenbush v. Lang*, 28 Penn. State, 193, and the cases *infra*.

PRESIDENT, DIRECTORS, &c., OF THE UNION BANK OF WEYMOUTH AND BRAINTREE *v.* TILLEY WILLIS.

(8 Metcalf, 504. Supreme Court of Massachusetts, October, 1844.)

Indorsement by one not a party. — If a person not a party to a note place his name upon the back of it at the time it was made, he is liable as maker; and when the note is in the hands of a *bona fide* holder, the presumption in the absence of proof is that the name was placed upon it at the time it was executed.

ASSUMPSIT by the indorsees against the indorser of a promissory note of the following tenor: “August 8th, 1843. For value

received, I promise Tilley Willis, to pay him, or order, \$350, in four months from date. T. D. Thompson." On the back was the name of B. L. Mirick & Co., and under that name was the name of the defendant, both indorsements being in blank.

At the trial before the Chief Justice, the plaintiffs' cashier testified that they discounted the note for Thompson, and that, when it was discounted, the names stood on the note as they now do. There was no evidence that the note was presented to Mirick & Co. for payment; but there was evidence tending to show that notice of dishonor was given to them, as indorsers, as well as to the defendant.

The defendant contended that Mirick & Co. were to be considered as joint, or joint and several, promisors, and that the defendant was not responsible as indorser, without proof of presentment to them for payment. But it was ruled that they were not to be so considered as promisors, as that presentment of the note to them, and demand of payment of them, were necessary to charge the defendant. A verdict was returned for the plaintiffs, which is to be set aside, and a new trial granted, if the ruling was incorrect.

HUBBARD, J. It is admitted that the note was not presented for payment to Mirick & Co.; and the question is, whether the omission to do it discharges the indorser.

If the subject now brought before us were a new one, we should hesitate in giving countenance to such an irregularity, as to hold that any person whose name is written on the back of a note should be chargeable as a promisor. We should say, that a name written on the paper, which name was not that of the payee, nor following his name on his having indorsed it, was either of no validity to bind such individual, because the contract intended to be entered into, if any, was incomplete or within the statute of frauds; or that he should be treated, by third parties, simply as a second indorser; leaving the payee and himself to settle their respective liabilities, according to their own agreement.

But the validity of such contracts has been so long established, and the course of decisions, on the whole, so uniform, that we have now only to apply the law, as it has been previously settled, in order to decide the present suit.

The first case of this description, of which any mention is made

in the reports, is that of *Sumner v. Parsons*, tried before this Court in Lincoln county, July term, 1801. The facts were these: "Parsons wrote his name on a paper and gave it to John Brown, but there was no evidence of the intent, or of any connection in business between them. Brown made a note on the other side, payable to Jesse Sumner or order, on demand, with interest, and signed it, and thirty days after made a partial payment on it. Sumner then got a writing in these words over the name of Parsons: 'In consideration of the subsisting connection between me and my son-in-law, John Brown, I promise and engage to guaranty the payment of the contents of the within note, on demand.' And he sued Parsons, declaring on the promise, specially stating it, and the note, but did not aver any demand on John Brown, or notice to Parsons. In two trials in the Supreme Judicial Court, it was held that Parsons was liable, and that Sumner had a right to fill the indorsement so as to make Parsons a common indorser of the note, with the rights and obligations of such, or a guarantor, warrantor, or surety, liable in the first instance, and in all events, as a joint and several promisor would be." *Am. Prec. Declarations*, 113. Mr. Dane, who cites it in his *Abridgment*, Vol. I. 416, 417, remarks, that "this case was carried as far as any case had gone, and on the review the Court was not unanimous; and it has since been questioned;" and we have no doubt with good reason; for the holder of the paper, having himself set out the contract by the words written over the name of the defendant, should have been held by its terms, and the legal effect should have been given to the material word "guaranty." And in that view of the contract, the promise of Parsons was only to pay after a demand upon Brown for payment, and a refusal by him, and of which Parsons should have had notice. But the Court must have construed the writing as constituting him an original promisor, and so bound, absolutely, without notice. And in our apprehension, the writing of the guaranty over the name of Parsons ought not to have been held as an act obligatory on him; but he should have been treated, if held at all, as an indorser of the note, and, as such, subject to the liabilities, and entitled to the notice of an indorser. See *Beckwith v. Angell*, 6 Conn. 325, opinion of *Hosmer, C. J.*

The next case which came before the Court was that of *Josselyn v. Ames*, 3 Mass. 274. By the report, it appears that John Ames

was indebted on note to the plaintiff, who demanded security, and John offered his brother Oliver as surety, who was accepted. John then made a note to Oliver, not negotiable, and Oliver put his name on the back in blank. The plaintiff received it and gave up his former note, and afterwards wrote over the defendant's name the same words as in *Sumner v. Parsons*, with this additional clause: "and in consideration of receiving from Elisha Josselyn a note of the said John of the same amount." The Court held that the plaintiff could not recover in that action, but might cancel the words written, and substitute, "for value received, I undertake to pay the money within mentioned to Elisha Josselyn," and, upon such an indorsement, might maintain an action upon the facts reported.

In what light the Court held the defendant, does not distinctly appear; but we presume as an original promisor, from the manner in which the case of *Sumner v. Parsons* is spoken of. "The guarantor in that case," they say, "was not the promisee, but a stranger, who warranted the payment to him. He cannot himself warrant to a third person payment of a note made payable to himself and not negotiable."

The next reported case is that of *Hunt v. Adams*, 5 Mass. 358, which was assumpsit on a note given by Chaplin to Bennet, under which the defendant wrote, "I acknowledge myself holden as surety for the payment of the demand of the above note. Witness my hand. Barnabas Adams." This cause was much considered, and the Court ruled that the defendant, Adams, was to be charged as a promisor, and that his holding himself as surety did not abridge or affect the plaintiff's rights, but only was evidence, as between the promisor and himself, that he had signed for his accommodation. Other cases between the same parties, on similar notes, afterwards arose, and were decided in the same manner. 6 Mass. 519.

Immediately after, occurred the case of *Carver v. Warren*, 5 Mass. 545. That was on a note made by one Cobb to the plaintiff, and on the back of which the defendant wrote his name: and the plaintiff filled the indorsement, and declared upon it as his promise. The defendant demurred to the declaration, on the ground that this was but a promise to pay the debt of another, and was void for want of consideration. But the Court held that, by the pleadings, each promised to pay the same sum, and that the

defendant's promise did not import any guaranty or collateral stipulation; and that if the defendant had indorsed as guarantor, and the present indorsement was filled up without his consent, or any authority from him, he should have pleaded the general issue, and on the trial he might have availed himself of this defence. And so the plaintiff had judgment on the demurrer.

The case of *Hemmenway v. Stone*, 7 Mass. 58, followed. There the note ran, "I promise to pay F. M. Stone or order," and was signed B. Chadwick; and below was signed by the defendant. The Court held that it was a joint and several note, like the case of *March v. Ward*, Peake's Cas. 130. See also *Bayley, Bills* (2d Am. ed.), 44.

The next case was *White v. Howland*, 9 Mass. 314, which was on a note payable by one Taber to the plaintiff, and on the back of it was written, "for value received, we jointly and severally undertake to pay the money, within mentioned, to the said William White. I. Coggeshall, Jr. Jno. H. Howland." The Court held that this undertaking was within the principle settled in *Hunt v. Adams*, and was the same as if the party had signed his name on the face of it; and that he was well charged as a several original promisor.

The case of *Moies v. Bird*, 11 Mass. 436, which succeeded, is substantially like the present. A note was made to the plaintiff, and signed by Benjamin Bird, and the defendant signed his name in blank on the back of the note. The Court say, the defendant "leaves it to the holder of the note to write any thing over his name which might be considered not to be inconsistent with the nature of the transaction. The holder chooses to consider him as a surety, binding himself originally with the principal; and we think he has a right so to do. If he was a surety, then he may be sued as an original promisor."

In the case of *Baker v. Briggs*, 8 Pick. 130, which was an action to recover the amount of a promissory note made by one Ryan to the plaintiff, the name of the defendant, Briggs, was written on the back of it, and the Court say that, according to several decisions, it was right to declare against him as promisor, though he stood in the relation of surety to Ryan, who signed the note on the face of it.

The case of *Chaffee v. Jones*, 19 Pick. 260, was assumpsit on a note signed by Israel A. Jones, as principal, and Eber Jones and

E. Owen and Sons, as sureties, by which they jointly and severally promised to pay the president, &c., of the Housatonic Bank, or their order; and the plaintiff put his name on the back of the note, in blank. The plaintiff was called upon, after the neglect of the makers, and he paid it to the bank. The Court held that where one, not a promisor, nor indorser, puts his name on a note, meaning to make himself liable with the promisor, he is to be regarded as a joint promisor and surety. He is not liable as indorser, for the note is not negotiated, nor a title made to it, through his indorsement; nor as guarantor, there being no distinct consideration; but he means to give security and validity to the note by his credit and promise, and it is immaterial, for this purpose, on what part of the note he places his name. So in *Austin v. Boyd*, 24 Pick. 64, where the defendant's name was, in like manner, on the note, it was held that the party, by thus putting his name on the back, makes himself an original promisor. He intends by it to give credit to the note.

The case of *Samson v. Thornton*, 3 Met. 275, was assumpsit on a note made by Benjamin Russell to the plaintiff, and was indorsed by the defendant Thornton; and the declaration charged him as an original promisor. The Court there ruled that the defendant, not being the payee of the note, must be held to stand in the character of an original joint promisor and surety.

The case of *Richardson v. Lincoln*, 5 Met. 201, is of the same type. There the Court held that the defendant, not being payee, but having put his name, in blank, on the note, must be considered as an original promisor and surety, if he put it on simultaneously with the promisor, as an original contractor. See also *Sumner v. Gay*, 4 Pick. 311.

The same questions have arisen in New York, in various cases, and have been decided in a similar manner. They will be found cited in *Story on Notes*, §§ 59, 472-480, where the subject is fully discussed, and the authorities examined.

To hold the party, however, as promisor, where the name alone is written, it must appear that he made the promise at the time when the note itself was made; otherwise, he may either not be chargeable at all, or be chargeable as surety or guarantor, according to the facts proved. *Carver v. Warren*, 5 Mass. 545; *Tenney v. Prince*, 4 Pick. 385; *Baker v. Briggs*, 8 Pick. 122, 130; *Oxford Bank v. Haynes*, 8 Pick. 423; *Story on Notes*, §§ 473, 474;

Beckwith v. Angell, 6 Conn. 315. But that the promise was made at the same time with the note, is a fact which is to be presumed when the note is in the hands of a *bona fide* holder, and nothing is shown to the contrary. And in the present case, the note was offered to the plaintiffs for discount, by the maker himself, with the names of Mirick & Co. and Willis on the back of it; showing it, therefore, to have been an original undertaking on their part.

It was contended, in the argument, that Mirick & Co. were merely sureties, and that the plaintiffs had a right to treat them as such, and therefore were not bound to demand payment of them as makers, as a necessary step to enable them to charge the indorser; the relation of promisor, surety, and guarantor being distinct. There is, unquestionably, a distinction between these several undertakings; and always so in regard to a mere guarantor. But as to the subsisting relations between a principal and surety, they rarely affect the contract between the creditor and surety. A man may be equally a surety and an original promisor; as where the promise is, I, A B, as principal, and I, C D, as surety, promise to pay; or where the party signs, and adds to his name the word surety. This does not make him less a promisor. It only defines the relation between him and his co-promisor; and as promisor, the necessity of a presentment to him is not dispensed with, if the intention of the holder of the note is to charge the indorser. It is not for the holder to choose in what character he will consider the party who has put his name on the note; but he must treat him as sustaining that legal relation which the facts establish. If he put his name on the note at the time it was made, like the case at bar, he is a promisor; if after the making of the paper, he is a surety or a guarantor, according to the agreement upon which he gives his signature. The fixing of the relation of the party, when he enters into the contract, is necessary for the protection of holders, and for guarding the rights of indorsers, whose liability is conditional. If it were held otherwise, I do not well see how such contracts could be supported against the objection of being void as within the statute of frauds. And, as it is, I consider these engagements rather as exceptions to the statute, than in any other light, and as growing out of, or rather ingrafted upon, the law merchant applicable to regularly drawn bills of exchange and promissory notes.

Upon this view of the law, as drawn from the various cases, we consider Mirick & Co. to have been joint and several promisors with Thompson, and liable in like manner with him.

This case is followed in Massachusetts by *Hawkes v. Phillips*, 7 Gray, 284, and by *Draper v. Weld*, 13 Gray, 580; the latter holding evidence to show that the third party put his name on the note with authority to fill the blank with a guaranty, inadmissible against one who took the paper without notice. But if the payee afterwards indorse above the signature of the third party, the latter then becomes an ordinary indorser, and his liability cannot be changed by parol. *Clapp v. Rice*, 13 Gray, 403. See *Howe v. Merrill*, 5 Cush. 80; *Vore v. Hurst*, 13 Ind. 551. If the signature of such person is written subsequently to the execution of the paper, and as an independent transaction, the signer is a guarantor. *Benthall v. Judkins*, 13 Met. 265; *Irish v. Cutter*, 31 Maine, 536. See preceding and following cases.

See also, to the same effect, *Wetherwax v. Paine*, 2 Mich. 555; *Lewis v. Harvey*, 18 Mo. 74; *Schneider v. Schiffman*, 20 Mo. 571; *Childs v. Wyman*, 44 Maine, 433; *Martin v. Boyd*, 11 N. Hamp. 385; *Carpenter v. Oaks*, 10 Rich. Law, 17. In *McGuire v. Bosworth*, 1 La. An. 248, it is held that such third person binds himself as surety.

HALL v. NEWCOMB.

(7 Hill, 416. Court of Errors of New York, December, 1844.)

Indorsement by one not a party.—If one who is not a party to a promissory note place his name upon the back thereof, the payee not having indorsed it, he is to be regarded as an indorser, and not as maker or guarantor.

THE case is stated in the opinion of the Court.

THE CHANCELLOR. In April, 1840, Peter Farmer made a promissory note for two hundred and fifty dollars, payable to Samuel Hall, the plaintiff, or his order, on demand, with interest; on the back of which note Newcomb, the defendant, indorsed his name in blank, at the request of Farmer, to enable him to get the money on the note. In November, 1841, Hall, without having demanded payment of the note from the maker, or given notice of non-payment to the indorser, brought a suit against the indorser alone, to recover the amount of the note and interest. And the question for our consideration is, whether a person who puts his name in blank upon the back of a negotiable note, which is drawn in such

a form that he may be charged as indorser in the usual mode, if a demand is made and notice of non-payment given, can be charged as a general surety, without such demand and notice, by parol evidence merely. In the case of *Prosser v. Luqueer*, which was decided by this Court in December last, I expressed the opinion that he could not. See 4 Hill, 420. The reporter misunderstood my opinion in that case, however, if he supposed I intended to intimate that I thought the holder of the note, which was recovered on there, could have maintained a joint action against the makers and the indorser of the note in a count charging them all as joint and several makers of the note. The joint action was sustained against them, in that case, upon the common money counts, under the statute, as makers and indorsers, and the service of a copy of the note with the declaration. But as the indorser had waived notice of non-payment, and had absolutely guaranteed the payment of the money, for value received, I thought, upon the authority of the decisions there referred to, his guaranty was itself a several promissory note payable to the bearer of the note written by Edson and Arnold on the other side of the paper; not that he could be considered as having made a joint promise with them.

The courts have gone far enough in repealing the statute to prevent frauds and perjuries, by introducing parol evidence to charge a mere surety for the principal debtor, by showing that his written agreement means something else than what upon its face it purports to mean. And I fully concur in the opinion expressed by Mr. Justice *Bronson*, in *Seabury v. Hungerford*, 2 Hill, 80, that where a man writes his name in blank upon the back of a negotiable promissory note, he only agrees that he will pay the note to the holder, on receiving due notice that the maker, upon demand made at the proper time, has neglected to pay it. Mere proof that he indorsed the paper to enable the maker to raise money on it, does not change the nature of his legal liability as indorser, where the note is in the hands of a *bona fide* holder for a good consideration. Such was the whole effect of the parol proof in this case. And for the courts to allow proof by parol to charge a mere surety, beyond the legal effect of his written blank indorsement on such paper, would bring them in direct conflict with the provisions of the statute of frauds. 2 Rev. Sts. 135, § 2, sub. 2.

Here there was no difficulty in charging Newcomb as indorser of the note, in favor of Hall, from whom it appears the maker

intended to get the \$250 to enable him to take up a former note. It does not appear in this case whether the former note had been protested, so as to charge Newcomb as indorser, or not ; or who was the holder of that note. All that appears is, that Newcomb knew that Hall would lend Farmer the \$250 to enable him to take it up ; and that Newcomb indorsed this note for Farmer, as a mere accommodation indorser, when the name of Hall, to whose order the note was made payable, was not indorsed thereon. Where a note is made payable to an individual or his order, and is indorsed by him in blank, and in that situation is presented to another person for his accommodation indorsement, who indorses it accordingly, the legal effect of his indorsement is to make him liable in the character of second indorser merely ; and he can in no event be made legally liable to the first indorser. And if the maker, or the first indorser, or any other person into whose hands the note might subsequently come, should, without the consent of the second indorser, fill up the first indorsement specially, without recourse to such first indorser, so as to deprive the second indorser of his remedy over in case he should be compelled to pay the note, it would be a gross fraud upon him, if not a forgery. But when such a note is presented to the accommodation indorser, and is indorsed by him without having been previously indorsed by the person to whose order the same is made payable, the latter may, at the time he puts his indorsement upon it, indorse it specially without recourse to himself ; so as to leave the second indorser liable to any person into whose hands it may subsequently come for a good consideration, and without any remedy over against the first indorser. Or, if the object of the second indorser was to enable the drawer, as in this case, to obtain money from the payee of the note, upon the credit of such accommodation indorser, he may indorse it in the same way without recourse ; and by such indorsement may either make it payable to the second indorser, or to the bearer. And such original payee may then, as the legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him, and subsequent indorsement of the note to him by the second indorser. Or he may recover on the common money counts, under the statute, by serving a copy of the note, and of the indorsements so made thereon, with his declaration. But as the second indorser, if he has not waived notice of the

demand of and non-payment by the maker, cannot be made liable upon his indorsement without proof of such demand and notice, the plaintiff at the trial must prove the same, or he cannot recover.

In the case of *Herrick v. Carman*, 12 Johns. 159, the payees of the note, who had received it on the credit of Herrick, had themselves made a general indorsement of the note, instead of a restricted one; so that if Carman recovered against Herrick who had been duly charged as indorser, the original payees would be liable to him as first indorsers. And a recovery by Carman would therefore, have rendered them liable, contrary to their agreement with him. And in *Tillman v. Wheeler*, 17 Johns. 326, the payee of the note attempted to charge the indorser as upon a general guaranty, without having made him liable as indorser by a demand of the makers of the note, and notice of its non-payment. Both cases, therefore, were rightly decided. The remarks of the judges as to the right of the Court to turn an indorsement into an absolute guaranty, upon a different state of facts, were uncalled for, and are therefore not entitled to the weight of judicial decisions in opposition to the provisions of the statute of frauds. The decision of the majority of the Supreme Court in the case of *Nelson v. Dubois*, 13 Johns. 175, was clearly wrong. The note in that case being payable to Nelson or bearer, the defendant might have been charged as the indorser of the note without any indorsement by Nelson. For where a note payable to bearer is indorsed by another person generally, the person who thus puts his name upon it is liable as an indorser, and may be charged as such upon due notice to him of demand and non-payment of the note by the maker. *Hill v. Lewis*, Skin. 410; *Bank of England v. Newman*, 1 Ld. Raym. 442; *Eccles v. Ballard*, 2 McCord, 388; *Brush v. The Administrators of Reeves*, 3 Johns. 439, 440. It was improper therefore to allow parol evidence to enable the holder of the indorsement to turn a conditional liability, as indorser, which the plaintiff had lost the benefit of by his neglect to give notice of demand and non-payment, into an absolute contract to pay the note, in disregard of the provisions of the statute of frauds. In declaring specially upon such an indorsement, the proper course is to set out the making of the note, the special indorsement thereof by the plaintiff to the defendant, where it is payable to order, or the delivery to him where it is payable to bearer or to

the plaintiff or bearer ; and then to state the subsequent indorsement of the note by the defendant, by which he ordered and appointed the contents thereof to be paid to the plaintiff, and the demand of the maker of the note and notice of non-payment duly given to the defendant as such indorser. The erroneous decision of the majority of the judges of the Supreme Court in *Nelson v. Dubois* not having received the sanction of this Court and being in conflict with the statute of frauds, it is not too late to declare the law in conformity to the statute, as a majority of the judges of the present Supreme Court have done in this case. I conclude, therefore, that the decision of the common pleas in this case was right, and that the judgment of the Supreme Court sustaining that decision was not erroneous, and should be affirmed.

Senators *Barlow* and *Wright* delivered opinions in favor of affirming the judgment of the Supreme Court, concurring in the view taken of the case by the Chancellor.

Bockee, Senator. It appears very satisfactorily from the testimony in this cause, and the nature of the transaction, that the parties intended to give a note or security on which Newcomb, as well as Farmer, should be liable to the plaintiff for the money to be advanced by him. They failed in effecting that object in the usual form of an indorsed promissory note, probably from mistake or ignorance of the proper form of negotiable instruments. In the form in which the note is presented to us, Newcomb cannot be treated as an indorser. An indorser is one who, by his signature, transfers the legal interest in the note. From such indorsement, whether the signature is on the back or the face of the note, result the liabilities and privileges of a commercial indorser. Newcomb had no such legal interest in the note, and could not make such an indorsement, because the note is payable to Hall, and is not indorsed by him. Newcomb can never be made liable to Hall as indorser. The payee of a note cannot maintain an action against the indorser. So it was ruled in the case of *Herrick v. Carman*, 10 Johns. 224, where the indorsee failed in maintaining an action against the second indorser, because it was proved that he was the mere agent of the payee and first indorser. Taking this note in the precise form in which it is, payable to Hall, with the signature of Newcomb on the back of it, and laying aside all the other tes-

timony in the cause, it would be the case of *Herrick v. Carman* above cited, and Newcomb could not be made liable in any form. Had Newcomb put his name on a note designed for discount at a bank or otherwise, intending to be the second indorser, and knowing that his indorsement would be inoperative until the note was indorsed by the payee, he would then be strictly within the rule applicable to a commercial indorsement, and entitled to its privileges. The evidence in this case, however, excludes such a supposition. It is very clear that Newcomb put his name on the note, knowing that the money was to be obtained from Hall, the payee. The inference is very strong, at least a jury might think so, that Newcomb intended to be surety for the money so advanced by Hall to Farmer, and did not intend to make himself the indorser of a negotiable promissory note. The signature of Newcomb is a nullity, unless he is liable as guarantor, or on an original undertaking as surety, to pay the note. It is immaterial in which character he is made liable. Here we may safely rest upon the principle laid down by the Supreme Court in the decision of this cause, that such a construction should be given to the contract as will prevent its failure altogether. The maxim *ut magis res valeat quam pereat*, quoted by the learned judge, comes in aid of the plaintiff, and is decisive in his favor. It is suggested by the learned judge who delivered the opinion of the Supreme Court, and the decision appears to be mainly founded upon this suggestion, that the plaintiff, by indorsing the note, might have put it in a form in which it would be available to the holder against Newcomb as second indorser. True, he might have indorsed the note and sent it into the market, so that an innocent *bona fide* holder might have recovered against Newcomb as second indorser, but in such case Hall, as first indorser, would have been liable to Newcomb. The order of liability would be reversed. Hall would become surety to Newcomb, instead of holding Newcomb as surety for Farmer.

It is said that Hall might have indorsed the note without recourse, and then, although he was the payee and first indorser, might himself have recovered as the indorsee of Newcomb. This would be placing Hall in a position never intended by the contract. I think we must take this instrument and decide the rights of the parties under it in the precise shape and form in which it appears to us, without indorsement by the payee. Viewing this instru-

ment as commercial paper, indorsed by Newcomb for the accommodation of the maker, I doubt the right of the payee to negotiate it by a restricted indorsement, in which case it might operate as a fraud upon the person who puts his name upon the note with the view of being the second indorser. If the payee makes such indorsement, I think it would not avail. An indorsement is strictly and literally an order to pay money. Hall orders the money to be paid to Newcomb, whose name already stands upon the note, we may presume, as second indorser. He writes over Newcomb's signature an order to pay back the money to himself. By this little contrivance it is supposed that a right of action would accrue to Hall against Newcomb as indorser, when he had not before any such right of action. This sort of finesse and shuffling game is below the dignity of the law. We must take this contract as the parties left it, complete and perfected when the note was delivered to Hall, and we have no right to ask him to resort to practices bordering on trick and deception, for the purpose of changing the character and liability of the parties. If Mr. Hall could legally and properly pursue the course advised by some of our learned friends, I can see no reason why a restricted indorsement may not be written over the name of any prior indorser of accommodation paper, and so the person who has lent his signature on the faith of the responsibility of those who have preceded him, may be utterly ruined, and that without remedy. I think that Judge *Spencer*, in the case of *Herrick v. Carman*, 12 Johns. 161, states the law of this case correctly, and draws the proper distinction. Where a person indorses a note for the purpose of giving the maker credit with the payee, and with knowledge of the use to be made of the note, he is liable as on an original undertaking, and his indorsement may be turned into a guarantee. Otherwise, if he indorses the note without any such knowledge. It must then be presumed that he intended only to become a second indorser, with all the rights which pertain to that character. In the latter case he is not liable to the payee, nor to any person deriving title from him with knowledge of the circumstances attending the indorsement. This principle has, I think, been recognized and sanctioned by every analogous case to be found in the books from 12 Johns. down to 5 Hill, and ought at this day to be considered as settled and established law, if in the conflict of decisions and diversity of opinion among judges any principles can

be considered as settled and established. The case of *Seabury v. Hungerford*, 2 Hill, 80, on the authority of which the decision of the Supreme Court mainly rests, is not an exception. The principle of that case is not adverse to the present plaintiff's right to recover. The maker drew a note payable to Seabury or bearer, with a view of borrowing money from him, which note, before delivery, was indorsed by Hungerford; and it was held that Hungerford could not be charged as maker or guarantor, but only as indorser. Now two remarks may be made explanatory of the difference between that case and the present. It does not appear that Hungerford knew that the money was to be advanced by the payee, and it is not disputed that, on a mere naked indorsement of negotiable paper, unconnected with knowledge of the use to be made of it, the party could be charged only as indorser. It may be further remarked, that the note in that case was payable to Seabury or bearer, and the observation of Judge *Cowen* would be apt and pertinent, that the payee might, by transferring the note, render it available to any holder against Hungerford as indorser. Not so in the present case, where, though words of negotiability are used, they are entirely inoperative, and might as well have been left out of the instrument. The plaintiff could not have transferred the note without involving himself in responsibilities never intended, and entirely inconsistent with the contract between the parties. Then let the rule of *Seabury v. Hungerford* be applied to this case, and as there is no possibility of charging Newcomb as indorser, consistently with the contract and intention of the parties; and as he knowingly undertook to be surety for Farmer to Hall in some form, he must be held liable either as guarantor or as an original promisor. He may be sued in either character.

Another point made on the argument of this cause is, "that the statute of frauds would bar a recovery against the defendant on any other ground than that of an indorser." The case of *Leonard v. Vredenburg*, 8 Johns. 29, is exactly analogous to the present, and appears to settle the principle very conclusively in favor of the plaintiff. Here, as well as there, the undertaking was a part of the original transaction, and the defendant's undertaking was the inducement to the creation of the debt. Parol testimony was admitted without objection on the trial, and was properly admitted to show the attending circumstances, and the

purpose and design for which the signature of the defendant was affixed to the instrument.

The nonsuit was improperly granted, and the judgment of the Court of Common Pleas, and of the Supreme Court are erroneous, and should be reversed.

*Judgment affirmed.*¹

This case is followed in New York by *Spies v. Gilmore*, 1 Comst. 321; *Ellis v. Brown*, 6 Barb. 282; *Waterbury v. Sinclair*, 26 Barb. 455. See also, to the same effect, *Clonston v. Barbieri*, 4 Sneed, 336, approving *Comparree v. Brockway*, 11 Hum. 355; *Fear v. Dunlap*, 1 Greene (Iowa), 331; *Jennings v. Thomas*, 13 Smedes & M. 617; *Riggs v. Waldo*, 2 Cal. 485; *Pierce v. Kennedy*, 5 id. 138; *Wells v. Jackson*, 6 Blackf. 40; *Vore v. Hurst*, 13 Ind. 551. See preceding and following cases.

BARZILLAI SYLVESTER, Executor, &c., *v.* SOLOMON DOWNER.

(20 Vermont, 355. Supreme Court, March, 1848.)

Indorsement by one not a party. — One who is not a party to a promissory note, by placing his name upon the same, the payee not having indorsed it, renders himself *prima facie* liable as maker; but evidence may be received to show the real intention of the signer.

ASSUMPSIT against the defendant as maker of a promissory note payable to Austin and Fay, or order, and by them indorsed to the plaintiff's intestate. The declaration also contained a count for money had and received. Plea, the general issue, and trial by jury, March term, 1846, — *Redfield, J.*, presiding.

On trial the plaintiff offered in evidence a promissory note, for \$75.00, signed by one David E. Strong, dated March 27, 1837, and made payable to Austin and Fay, or order, in the month of February then next, with the following indorsements: "For value received, pay the contents to Lemuel Sylvester, (signed) Austin and Fay;" "For value received, I promise to pay this note according to its tenor to Lemuel Sylvester, (signed) Solomon Downer." To this evidence the defendant objected, for variance; but the objection was overruled by the Court. It appeared that the indorsements

¹ The vote of the Court stood: For affirmance, 17; for reversal, 8.

were made in blank, and were filled up by the plaintiff before trial.

REDFIELD, J. This is an action, in common form, against the defendant as a sole maker of a promissory note. The note, on being produced, showed his name indorsed upon it, and also that of the payees of the note. This, according to the decisions of this Court, repeatedly made, imposed upon the defendant the obligation of the maker of the note, with this difference only, that, his undertaking being in blank, as between the parties to it, it was susceptible of being controlled by oral evidence of the real obligation intended to be assumed at the time of signing. This has been so often declared by this Court, that it seems needless to refer to the decisions. But I will advert to some of them, with a view to extract from them the *principle* of the decisions.

The first case, which distinctly assumed this ground, is that of Knapp v. Parker, 6 Vt. 642. In that case the note had been due, before it was indorsed by the defendant, and he was sued as maker, and the suit sustained. It is true, the Court, in their opinion, advert to a prior contract, resting in parol merely; but this was clearly merged in the writing. It was of no importance, in determining the *prima facie* legal obligation resulting from the *signature*. The *law* determines that; and the oral evidence was important only as tending to show, that the defendant *intended* to assume just such an obligation, *as he did* by the blank signature.

But to show that the circumstance of the previous contract is not of importance, we need only advert to the subsequent cases. In Flint v. Day, 9 Vt. 345, the former case is cited by the late Chief Justice, as a decision of the Court to the effect, that one, who signs a note *after it becomes due*, and by *merely indorsing his name upon the back*, is nevertheless holden *as a maker*, and to the same extent as those who sign upon the face of the note. And in this latter case the defendant, who wrote his name upon the back of the note, because the bank would not take it upon the names already upon it, was holden liable to contribute with a surety, who signed the note upon its face, and who was compelled to pay the whole note. The Court declare, that the defendant (who declared at the time he signed the note, that he knew the plaintiff to be good, and was not afraid to "back the note") became a joint principal to the bank (the payee), and must stand as a co-surety with the other sureties.

The case of *Sanford v. Norton*, 14 Vt. 228, was where the defendant wrote his name upon the back of the note, after it was negotiated, and before it came into the hands of the plaintiff. And the Court had no difficulty in holding the defendant *prima facie* liable, as a maker of the note, and liable to all the incidents resulting from becoming a maker. But the judgment of Chief Justice *Williams*, in the County Court, was reversed in the Supreme Court, upon the ground that he should have received evidence, which was offered by the defendant, to show that, at the time he wrote his name upon the back of the note, he was understood to assume only the obligation of a common indorser, and was therefore entitled to require a demand upon the maker and notice back. At the next trial in the County Court I was myself present, and admitted the evidence, according to the decision of the Supreme Court, and the plaintiff again obtained a verdict by showing demand and notice. And that judgment was affirmed in this Court. It is true that the Chief Justice, in declaring the judgment of this Court, or rather, in writing out his opinion for the press, took occasion to pass some strictures upon the decision of the Court in the former case. And however just they may be, or however unjust, it is not important now to inquire. They were certainly not pertinent to the decision then made, which was, in fact, a full and unqualified affirmance of the former decision, and not, as the Chief Justice undertook to show, a departure from it.

This case, then, establishes the doctrine, that one who indorses his name on the back of a negotiable promissory note, while it is in circulation, *prima facie* assumes the obligation of maker, if he were not before a party to the instrument; and that his obligation is negotiable, in the same sense as the original contract, and may be sued in the name of any person into whose hands the note comes in the course of its circulation.

The same was in effect decided in *Strong v. Riker*, 16 Vt. 554. The point was expressly made in that case, that the defendant indorsed his name upon the note long *after it was made*; but the Court held that fact to be unimportant. In that case the note had passed out of the hands of the payee, long before the defendant indorsed it, but had not been indorsed by the payee. In passing it to still another person, not a party to the note, the defendant wrote his name upon the back of the note; and the Court held that he was holden as *maker*, and that he might be sued *in the name of the*

payee, who had no interest whatever in the note, at the time the defendant became a party to it, — thus making the defendant liable as maker of the note to the fullest extent, the same as if he had signed the note originally, and in the same form.

In all this it is not understood that the Court have ever decided that a mere guaranty is negotiable, whether it be collateral and conditional, or absolute. The contrary is no doubt true, as was declared in *Sanford v. Norton*, 14 Vt. 228.

But what this Court has repeatedly held upon this subject, is, that he who writes his name upon the back of a note, if he were not before a party to it, assumes the same obligation as if he wrote his name upon the face of the instrument; and that, although he do this long after the making of the note, it shall make no difference; if he consent to be thus bound, and induce others to take the note under that expectation, he shall be estopped to deny that fact, and is treated to all intents the same, precisely, as if he had signed the note in its inception. But, the signature being blank, he may undoubtedly show that he was not understood to assume any such obligation.

But the proof in the present case tended to show, and the jury have so found, that the defendant did intend to assume an unconditional obligation to pay the note, according to its tenor. This puts at rest all pretence, that the defendant was not understood to assume the common obligation, which his signature imported. This was, that of the maker of the note to Austin and Fay, as that was the form of the note at the time he indorsed it; and had they refused to indorse it, the defendant might have been sued, as maker, *in their names*, according to the case of *Strong v. Riker*, 16 Vt. 554. But they did indorse it. He was then liable, as maker, to any person who might become a holder of the note; and especially to the plaintiff's testator, for he assumed the obligation with the understanding that the note was going immediately into his hands, and that the defendant was liable to him. This point is fully decided by *Sanford v. Norton*, 14 Vt. 228. The declaration in this case, then, was precisely according to the proof, — that the defendant made a note to Austin and Fay, which was indorsed to the plaintiff's testator.

The fact, that the defendant's indorsement was filled up differently from the declaration, and differently from the import of his undertaking, is of no importance, as that is mere form, and may be

made at any time, and, if made wrong, may be corrected at any time. It is just as well if it be not made at all.

Judgment affirmed.

Cook v. Southwick, 9 Texas, 615, and Carr v. Rowland, 14 Texas, 275, hold a similar doctrine to that of the above case. It is true those cases say, that where the name of the third party is on the bill or note at its inception, which is the presumption in the absence of proof, he is regarded as a *guarantor* or surety; but they use the word guarantor as equivalent to maker in both cases, citing, in Cook v. Southwick, the case of Leonard v. Sweetzer, 16 Ohio, 1, which holds that a guaranty of the fulfilment of a contract, written below the contract, and executed at the same time, renders the party liable as an original contractor. See also Watson v. Hurt, 6 Gratt. 633; Clark v. Merriam, 25 Conn. 576; Perkins v. Catlin, 11 Conn. 213; Schollenberger v. Nehf, 28 Penn. State, 189; Jennings v. Thomas, 13 Smedes & M. 617; Schneider v. Schiffman, 20 Mo. 571. In the last-named case it is held that, although it may be shown, as between parties entitled to look into the real transaction, that the third person signed as indorser, and not as maker, this cannot be shown against a subsequent *bona fide* holder. But see Carpenter v. Oakes, 10 Rich. Law, 19. See preceding and following cases.

B. F. GREENOUGH *et al.* v. W. SMEAD *et al.*

(3 Ohio State, 415. December, 1854.)

Indorsement by one not a party. — If one not a party to a note put his name on the back thereof, the note being subsequently indorsed by the payee below his signature, but not being intended for the payee, such party is to be regarded as an indorser; but if the note were intended for the payee, the liability of such third person is that of maker or guarantor.

THE case is stated in the opinion of the Court.

RANNEY, J. An action was brought and recovery had by the defendants in error in the Commercial Court of Cincinnati, upon the promissory note following: —

\$1000.

CINCINNATI, 30th May, 1850.

Sixty days after date I promise to pay to the order of Samuel R. Bates, four thousand dollars, value received.

GEORGE H. BATES.

Written on the back in the following order: —

B. F. GREENOUGH.
SAMUEL R. BATES.
BUTLER & BROTHER.

From the bill of exceptions, taken at the trial, it appears that the note was discounted by the defendant in error, after all the names were upon it, for the exclusive benefit of the maker, George H. Bates. On the morning of the day the note matured, George H. Bates died. It was duly presented at his last place of business, and also at his dwelling-house, and payment requested, and notice of non-payment immediately given to all the persons appearing upon the back of the note as indorsers. The plaintiff's counsel insist that Greenough was in fact, and should have been, treated by the holders as an original promisor and joint maker of the note with Bates; and, inasmuch as no demand of payment was made upon him, that the indorsers, Samuel R. Bates and Butler and Brother, are discharged from all liability upon it. This is supposed to result from the fact that his name was placed upon the paper before it was indorsed by the payee, and from the position it is there found to occupy.

Notwithstanding the great importance of a definite and uniform rule, fixing the liability incurred by a party to negotiable paper thus situated, a most perplexing contrariety of opinion is found to exist in the reported cases.

In Massachusetts, and several of the New England States, he is presumed, in the absence of proof of a different intention, to be an original promisor.

The cases will be found collected and ably examined, by J. Hubbard, in the *Union Bank of Weymouth v. Willis*, 8 Met. 504.¹ In that case A made a note payable to B, and C put his name in blank on the back of the note. B, the payee, then placed his name in blank on the back of the note under that of C.

In this condition, it was discounted by the plaintiff for A, the maker.

It was held that C was an original promisor, and in an action against B, the payee and indorser, the holders were defeated, because no demand of payment had been made of C. The Court regarded itself bound, by the previous course of decisions in that State, remarking that if the subject were brought before it for the first time, they "should say, that a name written on the paper, which name was not that of the payee, nor following his name on his having indorsed it, was either of no validity to bind such individual, because the contract intended to be entered into, if any, was incomplete, or within the statute of frauds; or, that he should

¹ *Ante*, 124.

be treated by third parties, simply as a second indorser, leaving the payee and himself to settle their respective liabilities according to their own agreement."

Whatever may have been the principle upon which the earlier decisions in New York proceeded, the subject has more recently been fully examined by the Supreme Court of that State in the case of *Ellis v. Brown*, 6 Barb. S. C. 282, and by the Court of Appeals in *Spies v. Gilmore*, 1 Comst. 321, and *Hall v. Newcomb*, 7 Hill, 416.¹

These cases seem to affirm that he can only be made liable as a second indorser; that he is within the protection of the statute of frauds, and therefore parol evidence is not admissible to show that he intended to bind himself as an original promisor or guarantor. That the indorsement is entirely nugatory until the note has been indorsed by the payee, and that he is then to be charged by a subsequent holder only upon due demand of the maker and notice thereof.

In Ohio, the case of *Champion and Lathrop v. Griffith*, 13 Ohio, 228, followed by *Robinson v. Abell*, 17 Ohio, 36, 42, has settled that the mere indorsement upon the note, of a stranger's name in blank, is *prima facie* evidence of guaranty. That to charge such person as maker there must be proof that his indorsement was made at the time of execution by the other party, or, if afterward, that it was in pursuance of an agreement or intention that he should become responsible from the date of the execution; that such agreement or intention may be proved by parol evidence; and that the rule is the same whether the instrument is negotiable or not.

The difference amounts to this: in Massachusetts such a party is presumed to be an original promisor; in Ohio, he is presumed to be a guarantor: but, in either State, parol evidence is received to rebut the presumption, and show what liability it was intended he should assume, and what relation he should sustain to the paper. In New York, he is presumed to have intended to assume the liabilities of an indorser, and parol evidence is not admissible to show a different intention.

We are not disposed to doubt the correctness of the rule laid down in the decisions already made in this State, when confined to the facts of the several cases in which it has been applied. This rule admits parol evidence to ascertain the intention of the

¹ *Ante*, 131.

parties, and requires us to consider what evidence was before the Commercial Court.

From the bill of exceptions it appears that the note was indorsed by all the parties for the accommodation of George H. Bates. That Greenough indorsed it before it was filled up; that George H. Bates on the same day filled up the note for \$4000, payable to the order of Samuel R. Bates, whose indorsement he then procured, and subsequently that of Butler and Brother. In this condition he took it to the defendants in error, and procured it to be discounted. It further appeared from the testimony of Greenough, who was called and examined as a witness for Butler and Brother, that he had been in the habit of exchanging accommodation indorsements with George H. Bates; that Samuel R. Bates had usually been a party to this paper; and that whenever it was intended that he should be the first indorser, his name was used as the payee. That without having any distinct recollection of this particular note, he was able to say from the course of business between them, that he intended to authorize George H. Bates to make him appear in any character upon the paper that would best serve the purpose of raising the money. This constituted a general letter of attorney to Bates to bind Greenough in any form he saw fit; but while it obligated Greenough to submit to any obligation that Bates saw fit to impose upon him, it also entitled him to the full benefit of any arrangement that Bates intended for his benefit. Looking at the transaction fairly, we cannot doubt that Bates, the maker, and his brother, the payee, intended to bind him as one of the indorsers of the paper, and to impose upon him all the obligations, and secure him all the privileges of that position; and that such was the understanding of Butler and Brother is perfectly manifest from the declarations of one of them, made after the note had been protested, in which he treated George H. Bates as the sole party primarily liable.

But if this testimony is left entirely out of view, and we have nothing but the fact that the note was discounted for the sole benefit of the maker, and became first legally operative when received by the defendants in error, we are still brought to the same conclusion.

In the common understanding of business men, it is very seldom supposed that one placing his name upon the back of a note becomes primarily liable for the payment of the debt. This understanding ought to be no further interfered with than is absolutely

necessary to give full effect to the lawful contracts of parties, and afford a remedy to the creditor commensurate with what he may be presumed to have expected when the promise was made. To do this it is only necessary to give effect to the undertaking of each of the parties upon the paper, precisely as they appear at the moment the instrument itself takes effect and becomes legally operative. If he then appears to be a stranger to the title, he must assume the position and responsibilities of a stranger, and as he cannot in such case be charged as an indorser, and as it cannot be supposed that he did not intend to bind himself in some way, he must be charged as a maker or guarantor. This will happen in all cases where the paper is designed for the payee, and the name of the stranger is put on the back for security. Such were all the cases yet decided in this State. There was no middle course: either the undertaking which the party intended to assume, and upon the faith of which the creditor had parted with his money or property, must take effect in that manner, or it was nugatory and without any effect whatever.

Nor would his position or responsibilities be changed, although the payee should afterward transfer the obligation. Once impressed with the character of maker or guarantor, they remain the same into whose hands soever it may come.

But the case is widely different when the paper is not designed for the payee, and the arrangement contemplates his indorsement as an accommodation party also, before it is used. In such case, there is no obligation incurred, no contract made, until the note is accepted by the person advancing the consideration upon it. Where it is so accepted, it then, for the first time, has its effect. It then has the indorsement of the payee, to transfer it to the party whose name is already upon it, evidencing his willingness to receive and transmit the title, and in his turn to assume the responsibility of an indorser when the note shall have accomplished its purpose, by being accepted by the party becoming beneficially entitled thereto. The order of this indorsement, in point of time or locality, is of no importance, but it is controlled wholly by the order contemplated by the *contract* of indorsement. *Chalmers v. McMurdo*, 5 Munford, 252. The fact that the party indorsed before the payee, as was well said by *Spencer, J.*, in *Herrick v. Carman*, 12 Johns. 161. "can have no influence, for he must have known, and we are bound to presume that he acted on that knowl-

edge, that though the first to indorse, his indorsement would be nugatory, unless preceded by that of the payee."

Two governing principles should be kept constantly in view: first, that such a construction should be placed upon the contract as will prevent its failure, and will give effect to the obligation of each of the parties appearing upon it at the moment the contract itself takes effect, — *ut res magis valeat quam pereat*; second, whenever the obligation of a party appearing upon the back of negotiable paper, can, at that time, take effect as an indorsement, it should always be held to do so, as conforming more nearly to the general intention of parties assuming that position upon it.

The first of these principles is disregarded by the present holding of the courts in New York, in treating as nugatory the obligation assumed by a stranger to the paper, when it is designed for and received by the payee, and when the name is indorsed to give credit to the paper with him. The last is disregarded in the case cited from Metcalf, in pushing the principle of original liability beyond the necessity of its application, and when at the moment the contract is consummated, the obligation of the party thus situated, can, and should have effect as an indorsement.

In New York, the present holding is directly opposed to a long series of earlier decisions, as is abundantly proved by the dissenting opinions in *Hall v. Newcomb*, and *Ellis v. Brown*, in which the very distinction we have made, is recognized and enforced, while in Massachusetts, not one of the numerous cases cited by the Court in the *Union Bank v. Willis*, had carried the principle beyond the liability assumed for the benefit of the payee.

Two states of the case may be supposed, in neither of which would Smead & Co. be obliged to treat Greenough as an original promisor. If the paper upon its face placed him in that position, yet, if in point of fact the arrangement between the parties was such as to entitle him to the privileges of an indorser, no demand need be made upon him, for the other indorsers having no recourse against him as maker, could lose nothing for the want of it.

On the other hand, if he appeared to be an indorser, but in fact, as between him and the other indorsers, he had agreed to assume the responsibilities of maker, yet Smead & Co., having no notion of such an arrangement, would not be bound to regard it.

In our opinion, not only the paper upon its face presented him as an indorser, but the evidence given, also comes to the same

result, and shows him a joint accommodation indorser with the other parties appearing upon the back of the note; and, as such, under the ruling in *Douglas v. Waddle*, 1 Ohio, 413, liable only for his proper proportion of the debt, as a co-security.

This view of the subject makes it unnecessary to pass upon the question made, as to the sufficiency of the demand. It may not be improper, however, to say that if Greenough could be treated as a joint maker, we should be of the opinion that the demand made, or rather the excuse for not making a demand, would be insufficient to charge the indorsers.

The question is not covered by the case of *Harris v. Clark*, 10 Ohio, 5, and we feel no hesitation in saying that the rule there adopted, should be confined to the precise state of facts upon which the decision was made. A demand upon one of several partners in business, is clearly sufficient, and the Court, in that case, considered the several "makers of a joint and several promissory note, *in the light of partners in that particular transaction.*" But surely the principle could have no application after the death of one of the parties had terminated the implied agency of the survivor; and it could not be deemed due diligence in the holder to present the note at the residence of the deceased partner, when the survivor was within his reach.

It is also assigned for error, that the Court refused to require the plaintiffs to fill up the blank indorsements, upon the trial. In this, we think there was no error. When the plaintiffs gave the note in evidence, with the names of all the defendants upon it, they, at the same time, established the liability of all, and title in themselves. They were as well entitled to the legal presumptions and inferences to be drawn from the face of the paper, as they were to what was fully expressed in it. All this belonged to its construction and legal effect, and as they claimed nothing more, there was no occasion for writing out what the law presumed without it. The name of the payee appeared, transferring the title; and while it is true that the precise order in which it had passed to and from the other indorsers, might not be apparent, a sufficient answer is, that this was wholly immaterial. In no possible case, could it defeat the title, or be a defence for any one of them.

If the plaintiffs had endeavored to establish a liability, not resulting from a fair construction of the paper itself, there would have been great propriety in compelling them to specify the precise nature of the undertaking, and of confining the evidence to its

support; but when nothing but the legal consequences of the instrument are invoked, we can see no possible benefit to accrue to the defendants from complying with such a demand, unless it should be the very illegitimate advantage arising from the plaintiffs having mistaken their legal rights.

The judgment of the District Court is affirmed.

This very ably considered case is cited as declaring the settled law of Ohio, in *Seymour v. Leyman*, 10 Ohio State, 283. The same rule prevails in Minnesota, that the third party becomes liable as maker, if he signs before delivery to the payee, and for further security to him. Nor will parol evidence be received in such case to show that he was to be bound as an indorser. *Peckam v. Gilman*, 7 Minn. 446. The law in Georgia is similar. *Quin v. Sterne*, 26 Ga. 223. And in Rhode Island, *Perkins v. Barstow*, 6 R. I. 505. See following case.

ALEXANDER REY, WILLIAM R. MARSHALL, and JOSEPH M. MARSHALL, partners under the firm name of Marshall & Co., Plaintiffs in Error, *v.* JAMES W. SIMPSON.

(22 Howard, 341. Supreme Court of the United States, December, 1859.)

Indorsement by one not a party. — The defendants, W. M. and J. M., not parties to the note in suit, placed their firm name on the back of the note, at its inception, and before it had been passed or offered to the plaintiff, at the request of the other defendant, the maker, knowing that the note had not been indorsed by the payee, and with a view to give credit to the same, for the benefit of the maker, *held*, that W. M. and J. M. were original promisors with the maker; evidence being admissible to show their intention.

THE case is stated in the opinion of the Court.

CLIFFORD, J. This is a writ of error to the Supreme Court of the Territory of Minnesota.

According to the transcript, the suit was commenced by James W. Simpson, the present defendant, on the twenty-first day of December, 1855, in the District Court of the Territory, for the second judicial district, against the plaintiffs in error, who were the original defendants. It was an action of assumpsit, and was brought upon a certain promissory note for the sum of three thousand five hundred and seventeen dollars and seven and a half cents, bearing date at St. Paul, in that Territory, on the fourteenth day of June, 1855, and was made payable to the order of the plaintiff six months after date, for value received. At the

period of the date of the note, as well as at the time the suit was instituted, two of the defendants, William R. Marshall and Joseph M. Marshall, were partners, doing business under the style and firm of Marshall and Company.

As appears by the declaration, the note was made and signed by the defendant first named in the original suit, at the time and place it bears date.

And the plaintiff further alleges in the declaration, that, after making and signing the note, the same defendant then and there delivered the note to the other two defendants : and that they then and there, by their partnership name, indorsed the same, by writing the name of their firm on the back of the note, and then and there re-delivered the same to the first-named defendant, who afterwards, and before the maturity of the note, delivered it so indorsed to the plaintiff. He also alleges that the defendants, William R. Marshall and Joseph M. Marshall, so indorsed the note for the purpose of guaranteeing the payment of the same, and of becoming sureties and security to him, as the payee thereof, for the amount therein specified, and that he, relying upon their indorsement, took the note, and paid the full consideration thereof to the first-named defendant.

Other matters, such as due presentment, non-payment, and protest, are also alleged in the declaration, which it is unnecessary to notice at the present time, as the questions to be determined arise out of the allegations previously mentioned and described.

Personal service was made on each of the defendants, but the one first named did not appear ; and after certain interlocutory proceedings, conforming to the laws of the Territory and the practice of the Court, he was defaulted.

On the thirty-first day of December, 1855, the counsel of the other two defendants served notice of a motion to strike out all that part of the declaration which sets forth the purpose for which it is alleged they indorsed the note, and so much of the declaration, also, as alleges that the plaintiff took the note as payee, relying upon the indorsement, and paid to the first-named defendant the full consideration thereof, as before stated. That motion was subsequently heard before the Court ; and on the ninth day of February, 1856, was denied and wholly overruled. After the motion was overruled, the defendants, whose firm name is on the back of the note, demurred specially to the declaration.

None of the causes of demurrer need be stated, as they will be

sufficiently brought to view in considering the several propositions assumed by the counsel on the one side and the other, in the argument at the bar. Suffice it to say, that the demurrer was overruled; and on the tenth day of July, 1856, judgment was entered for the plaintiff against all of the defendants for the amount of the note, with interests and costs.

On the eighteenth day of September, 1856, the defendants sued out a writ of error, and removed the cause into the Supreme Court of the Territory, where the judgment of the District Court was in all things affirmed; and on the fourth day of February, 1857, a final judgment was entered for the plaintiff, that he recover the amount of the judgment rendered in the District Court, with interest, costs, and ten per cent damages, amounting in the whole to the sum of four thousand three hundred seventy-one dollars and ninety-seven cents. Whereupon the defendants sued out a writ of error to this Court, which was properly docketed at the December term, 1857.

All civil suits in the courts of Minnesota are commenced by complaint: and suitors are enjoined by law, in framing their declarations, to give a statement of the facts constituting the cause of action; which statement is required to be expressed in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

Pursuant to that requirement, and the practice of the courts of the Territory at the time the suit was commenced, the plaintiff in this case set forth the facts already recited as contained in the complaint or declaration.

Facts thus stated in the declaration, pursuant to the directions of the law of the Territory, and which were material to the understanding of the rights of the parties to the controversy, could not properly be suppressed by the Court. Irrespective, therefore, of the question whether or not the motion of the defendants to strike out that part of the declaration was waived, because not pressed in the Supreme Court of the Territory, no doubt is entertained by this Court that the motion was properly overruled by the District Court upon the merits.

Proof of the attending circumstances under which the defendants, William R. Marshall and Joseph M. Marshall, had placed their firm name upon the back of the note, would clearly have been admissible in a trial upon the general issue; and if so, no

reason is perceived why it was not proper for the plaintiff, under the peculiar system of pleading which prevailed in the courts of the Territory at the time the suit was commenced, to state those circumstances in the declaration. Beyond question, they were a part of the facts constituting the cause of action; and, if so, they were expressly required to be stated by the law of the Territory prescribing the rules of pleading in civil cases. And having been alleged in pursuance to such a requirement, and being material to a proper understanding of the rights of the parties to the suit, it must be considered, by analogy to the rules of pleading at common law, that they are admitted by the demurrer.

By the admitted facts, then, it appears the defendants, William R. Marshall and Joseph M. Marshall, placed their firm name on the back of the note at its inception, and before it had been passed or offered to the plaintiff. They placed their firm name there at the request of the other defendant, knowing that the note had not been indorsed by the payee, and with a view to give credit to the note, for the benefit of the immediate maker, at whose request they became a party to the same.

Whatever diversities of interpretation may be found in the authorities, where either a blank indorsement or a full indorsement is made by a third party on the back of a note, payable to the payee or order, or to the payee or bearer, as to whether he is to be deemed an absolute promisor or maker, or guarantor or indorser, there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties; and in most instances it is conceded that the intention of the parties may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. Story, Prom. Notes, §§ 58, 59, 479.

When a promissory note, made payable to a particular person or order, as in this case, is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker, and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. On the other hand, if his indorsement was

subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor. But if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such indorsers.

Decided cases are referred to by the counsel of the defendants, which seemingly deny that such parol proof of the attending circumstances of the transaction is admissible in evidence; but the weight of authority is greatly the other way, as is abundantly shown by the cases cited on the other side. Whenever a written contract is presented for construction, and its terms are ambiguous or indefinite, it is always allowable to weigh its language in connection with the surrounding circumstances and the subject-matter, and we see no reason, as question of principle, why any different rule should be adopted in a case like the present. Such evidence has always been received in the courts of Massachusetts, as appears from numerous decisions, and the same rule prevails in most of the other States at the present time. 1 Am. Lead. Cas. 4th ed. 322. Repeated decisions to the same effect have been made in the courts of New York, and until within a recent period it appears to have been the settled doctrine in the courts of that State.

Recent decisions, it must be admitted, wear a different aspect; but they have not had the effect to produce a corresponding change in other States, and, in our view, deny the admissibility of parol evidence in cases where it clearly ought to be received. *Hawkes v. Phillips et al.*, 7 Gray, 284.

Applying these principles to the present case, it is obvious that the contract of the two defendants whose firm name is upon the back of the note was an original undertaking, running clear of all questions arising out of the statute of frauds.

They placed their names there at the inception of the note, not as a collateral undertaking, but as joint promisors with the maker, and are as much affected by the consideration paid by the plaintiff, and as clearly liable in the character of original promisors, as they would have been if they had signed their names under the name of the other defendant upon the inside of the in-

strument. Numerous decisions in the State courts might be cited in support of the proposition as stated, but we think it unnecessary, as they will be found collated in the elementary works to which reference has already been made, and in many others which treat of this subject.

Another objection to the right of recovery in this case deserves a brief notice. It is insisted by the counsel of the defendants, that the complaint or declaration is not sufficient to maintain this suit against these defendants as original promisors. That objection must be considered in connection with the system of pleading which prevailed in the courts of the Territory at the time the suit was commenced. By that system, suitors were only required to state the facts which constituted the cause of action. In this case the plaintiff followed that mode of pleading, and we think he has set forth enough to constitute a substantial compliance with the law of the Territory, and the practice of the Court where the suit was instituted. He alleges, among other things, that the defendants whose firm name is on the back of the note placed it there for the purpose of becoming sureties and security to him as payee for the amount therein specified. That allegation, to use the language of the statute of Minnesota, is expressed in ordinary and concise language, and in such a manner as to be easily understood, and that is all which is required by the law of the Territory prescribing the rules of pleading in civil cases. Under the system of pleading which prevailed in the courts of the Territory, the objection cannot be sustained.

The judgment of the Supreme Court of the Territory is therefore affirmed with costs.

It may be stated, as the result of the foregoing cases and citations, that in the following States, one who, not a party to negotiable paper, places his name, without more, on the back of the same, before an indorsement by the payee, renders himself, in the absence of proof, liable as maker or surety: Massachusetts, Vermont, Maine, New Hampshire, Michigan, Louisiana, Missouri, South Carolina, Texas; also in Rhode Island, Georgia, Ohio, and Minnesota, if the party signed before delivery to and to secure the payee.

In the following, as indorser: New York, Mississippi, Pennsylvania, Tennessee, Iowa, Wisconsin, California, Indiana. In New York this liability cannot be changed by parol proof.

In the following, as guarantor: Illinois, Connecticut, Ohio; also in Virginia, if the paper is not negotiable. In New York and Louisiana, if the paper is unnegotiable, such person becomes maker or guarantor. *Griswold v. Slocum*, 10 Barb. 402; *Cooley v. Lawrence*, 4 Martin, 639.

In Kentucky, as indorser or guarantor, as to which proof of intention will be received; but evidence is inadmissible to bind such signer as maker. *Kellogg v. Dunn*, 2 Met. Ky. 215.

But proof of intention is admissible in the courts of the United States, and probably in all the above-named States excepting New York and Massachusetts; and in the latter State it may be shown that the third person signed subsequently, to the execution of the paper, thus repelling the presumption that he is an original promisor. But if the fact is established, either by direct proof or by the legal presumption in the absence of proof, that the signature was contemporaneous with the making, no proof of intention will be received. See *Essex Company v. Edmands*, 12 Gray, 273; *Bigelow v. Colton*, 13 Gray, 309; *Lake v. Stetson*, ib. 310; *Pearson v. Stoddard*, 9 Gray, 199; *Wright v. Morse*, 9 Gray, 337; also note to *Union Bank of Weymouth v. Willis*, *ante*, p. 124.

The above supposes the mere signature of the name without more. If the party write a guaranty over his own name, the better opinion seems to be that his liability is that of guarantor. See *Spies v. Gilmore*, 1 Comst. 321; *Tinker v. McCauley*, 3 Mich. 188, overruling *Higgins v. Watson*, 1 Man. 428. But such a contract was held an indorsement in *Partridge v. Davis*, 20 Vt. 499, and in some other early cases. See note to *Brown v. Butchers' and Drovers' Bank*, *ante*, p. 110.

LEAVITT, President of the American Exchange Bank, *v.* PUTNAM *et al.*

(3 Comstock, 494. Court of Appeals of New York, July, 1850.)

Indorsement after maturity. — Negotiable paper does not lose its negotiable character by being dishonored; not even though indorsed to a particular person without other words.

THE case is stated in the opinion of the Court.

HURLBUT, J. On the twenty-ninth day of August, 1844, Messrs. J. W. and R. Leavitt made their note for \$1570.52, payable to the order of T. Putnam & Co. (the defendants), eight months after date. A few days after the maturity of the note, the defendants indorsed it as follows: "Pay the within to A. Thacher, value received, May 21, 1845. T. Putnam & Co." Thacher indorsed without recourse, and delivered the note for a valuable consideration to the American Exchange Bank, in whose behalf this action is brought.

On the trial, the defendants urged, among other grounds of objection to the plaintiff's recovery, that the defendants' indorse-

ment was in effect a new draft payable to Thacher only, and not negotiable, so that no action could be maintained upon it in the name of the plaintiff. In this they were sustained by the Court, and the plaintiff was nonsuited.

The other objections taken by the defendants on their motion for a nonsuit were not considered by the Court below, and under the circumstances of the case cannot be noticed on this appeal; so that the only thing for us to consider is, whether the indorsement of a note made after due, differs from one made before maturity in respect to its negotiability. It was conceded on the argument that no express authority could be found sustaining the distinction upon which the decision of the Superior Court was based, but it was urged that the defence could be sustained upon the principle that a dishonored note loses its mercantile character, and its indorsement becomes an original contract which must be made expressly negotiable in terms, or it could not be held to possess the character of negotiability. There is unquestionably a difference between the indorsement of a note after due and one while it is running to maturity, but this relates only to a single point arising from the necessity of the case; to wit, the time of payment, which, in the latter indorsement, is fixed at a future day by the express agreement of the parties, while in the former, it is declared by law to be within a reasonable time, upon demand. But in all other respects the contract is the same as an indorsement in the usual course of trade; and it is difficult to perceive how the single difference referred to can at all affect the negotiability of the indorsement. A bill or note does not lose its negotiable character by being dishonored. If originally negotiable it may still pass from hand to hand *ad infinitum* until paid by the drawer. Moreover the indorser after maturity writes in the same form, and is bound only upon the same condition of demand upon the drawer and notice of non-payment as any other indorser. Thus the paper preserves its mercantile existence and retains the main attributes of a proper bill or note, and circulates as such in the commercial community. Exceptions to a general rule affecting so important and numerous a class of transactions as the one under consideration must be productive of great inconvenience, and will not be indulged except for urgent reasons; and nothing has been made to appear in the argument or seems to exist in the case, which warrants the Court in treating the ordinary indorsement of a dishonored bill or note as without the law merchant

and not negotiable. While it was questioned whether such a note was negotiable, and whether the indorser was chargeable except upon the usual condition of demand and notice, there was perhaps reason enough to sustain the decision of the Court below. But since both the note and its indorsement, by a long course of decisions, have been treated as within the law merchant in respect to their main attributes, the indorsement ought to be regarded as negotiable to the same extent as an indorsement before maturity. The latter follows the nature of the original bill, and is equally negotiable. *Edie v. The East India Co.*, 2 Burr. 1216; *Mutford v. Waleot*, 1 Ld. Raym. 574; *Allwood v. Hazelton*, 2 Baylies, S. C. 457; *Bishop v. Dexter*, 2 Conn. 419; *Berry v. Robinson*, 9 Johns. 121.

The note in the present case was upon its face transferable, and its character in respect to negotiability could only have been changed by an indorsement containing express words of restriction. The defendants' indorsement was a full one, containing the name of the person in whose favor it was made, but omitting the words "*or order*," the legal effect of which was, nevertheless, to make the note payable to him or his order, and his indorsement therefore was effectual to transfer the note to the plaintiff. *Chitty, Bills*, 136; *Story, Prom. Notes*, § 139.

I am of opinion that the judgment of the Superior Court should be reversed, and a new trial awarded. *Judgment reversed.*

The doctrine of this case is well settled. See *Chitty, Bills*, 215; *Story, Promissory Notes*, § 178; *Id. Bills of Exchange*, §§ 220-223, and cases cited.

Upon the subject of defences in the case of paper overdue, see *HOLDER FOR VALUE*, *post*.

EBENEZER R. ESTABROOK *v.* WILLIS SMITH.

(6 Gray, 570. Supreme Court of Massachusetts, September, 1856.)

Indorsement of firm note by partner in his own name. — An indorsement by one partner, in his individual name, to his copartner, the paper being payable to the firm or order, will not enable the indorsee to sue thereon in his own name.

THE case is sufficiently stated in the opinion of the Court.

DEWEY, J. We take the rule to be uncontroverted, that a promissory note payable "to A B or order" cannot be trans-

ferred, so as to give a right of action in the name of a holder, not the original party, without an indorsement by the payee. The application of this principle seems to be decisive against the right of the plaintiff alone to maintain this action. The action is brought by Estabrook upon a note made to a copartnership, Estabrook and Richmond, promising them, by the name of their copartnership, to pay them or order a certain sum of money. That this action cannot be maintained by the plaintiff, as payee of the note, is obvious; as that would at once present a case where there was an omission to join all the payees as plaintiffs, which would be fatal to the action. The only question therefore, is, whether this note is legally indorsed, so as to enable the plaintiff to maintain the action as indorsee.

The payees of the note are Estabrook and Richmond, who compose a partnership. An indorsement of the note by the payees would therefore be an indorsement by Estabrook and Richmond, and this would correspond with the form of the note, and transfer the same to their indorsee. One partner might properly transfer the note by indorsement, but he must do it by indorsing the partnership name. Any thing less than this seems to be an irregularity, and a departure from the legitimate mode of transfer of a negotiable note or bill, payable to the order of a copartnership.

It is not contended that the indorsement by Richmond alone would have been sufficient to authorize an action in the name of a third person as indorsee; but it is urged that such indorsement is sufficient to authorize an action by the other partner, Estabrook, as indorsee. The position taken is, that Richmond, by his indorsement, has parted with all his interest, and so vested the entire note in Estabrook. This may be all true as between Richmond and Estabrook, and might be quite sufficient to settle, as between them, to whose use this money was to be held when collected. But the question still recurs, as to the effect of such an indorsement as against the maker of the note, and whether it creates the legal relation of indorsee. As already remarked, the present action, if maintainable at all, is maintainable by Estabrook as indorsee of the note. To constitute a legal indorsement, the payees, Estabrook and Richmond must be the indorsers. But no such indorsement has ever been made. No one has professed to indorse the note in the partnership name. The only indorsement is that of Richmond individually; and although it might be

quite competent for the payees, Estabrook and Richmond, in their partnership name, to have indorsed it to Estabrook, yet they have not done so.

We have found no authority for maintaining an action by an indorsee under such circumstances. The case of *Goddard v. Lyman*, 14 Pick. 268, which seems to be the most favorable case cited to sustain the position taken by the plaintiff, was widely different from the present case. In that case, although the original indorsement was by two only of three payees, and made to the other payee and a third person, yet it was subsequently indorsed by the third payee, and came to the hands of the plaintiff, who instituted the suit with the indorsement of all the payees. That case, upon its facts, does not therefore furnish any precedent for this case; although some of the remarks, as found in the opinion of the Court, might seem to indicate a broader doctrine than the case required.

Robb v. Bailey, 13 La. An. 457, was a case similar to the principal case; and the same rule was adopted. See also *Ferguson v. King*, 5 La. An. 642; *Fletcher v. Dana*, 4 Blackf. 377; *Desha v. Stewart*, 6 Ala. 852; *Moore v. Denslow*, 14 Conn. 235; *Absolon v. Marks*, 11 Q. B. 19; *Russell v. Swan*, 16 Mass. 314; *Hooker v. Gallagher*, 6 Fla. 351; 2 Greenl. Ev. § 163.

Upon the death of a member of a firm, the survivor may indorse in the firm name paper payable to the firm. *Jones v. Thorn*, 14 Martin, 463. Though it was not necessary in this case for the Court to go farther than to say that, in indorsing the firm name, the survivor thus passes all of *his own* interest, still the doctrine of survivorship in partnerships seems broad enough for the rule that such indorsement passes full and complete title to the paper, as much so as if regularly indorsed by the firm in the lifetime of the deceased copartner. Mr. Justice *Story*, in his *Treatise on Promissory Notes*, § 125, states that in such case, "The note, or chose in action, vests exclusively in the partner by survivorship, although he must account therefor, as part of the assets of the partnership;" citing *Crawshay v. Collins*, 15 Ves. 218, 226.

Where the paper is indorsed in blank to a firm, and one of the firm dies thereafter and before suit, the other members need not, as in contracts generally, declare as surviving partners, as they were not bound to prove the partnership, or that the paper was indorsed or delivered to them jointly with their deceased partner. *Attwood v. Rattenbury*, 6 J. B. Moore, 579. But it is otherwise if the paper is indorsed specially. *Ibid.*, per *Park, B.*, who said, in relation to special indorsements: "It has often been ruled that, in an action by the payees or indorsees, strict evidence must be given that the firm to whom it is indorsed consists of the persons who sue as plaintiffs on the record, whilst an indorsement in blank conveys a joint right of action to as many as agree to sue on the bill."

This, in substance, is the language of Lord *Ellenborough* in *Ord v. Portal*, 3 Camp. 239; and again in *Rordasz v. Leach*, 1 Stark. 446. See also *Machell v.*

Kinnear, 1 Stark. 499, in which it appeared that, though the indorsement was in blank, a right of action was vested in a firm as trustees of an insolvent. It was held that two of this firm could not, jointly with a third trustee, not a member of the firm, maintain an action on the bill, without some evidence of the transfer of the bill to them by the firm, by delivery or otherwise. See also *Guidon v. Robson*, 2 Camp. 302; *Low v. Copestake*, 3 Car. & P. 300; *Bawden v. Howell*, 3 Man. & G. 638; *Whitlock v. McKechnie*, 1 Bosw. 427; *Robb v. Bailey*, 13 La. An. 457; 2 Greenl. Ev. § 163; and cases cited at the beginning of this note.

The following cases deny the power of one of a firm to indorse paper payable to the firm, when the partnership has been dissolved in the *lifetime* of its members: *Sanford v. Mickles*, 4 Johns. 221; even though the partner may have authority to settle the partnership effects, *Abel v. Sutton*, 3 Esp. 108, per Lord *Kenyon*; *Humphries v. Chastain*, 5 Ga. 166; *Foltz v. Pourie*, 2 Desaussure, Eq. 40. See *Parker v. Macomber*, 18 Pick. 505.

But the contrary is held, if the dissolution was unknown to the indorsee, *Cony v. Wheelock*, 33 Maine. 366. See *Lewis v. Reilly*, 1 Q. B. 319. So if the firm note was made payable to the partner who, after dissolution, indorsed it. *Temple v. Seaver*, 11 Cush. 314.

"It is well settled that a note made by a partnership to one of its own members, or his order, when indorsed will enable the indorsee to maintain an action upon it. It is the promise of all to the order or appointee of one; and when the appointment is made by an indorsement, it is a valid contract with the indorsee." Per *Shaw, C. J.*, in *Thayer v. Buffum*, 11 Met. 398, citing *Pitcher v. Barrows*, 17 Pick. 361; *Smith v. Lusher*, 5 Cow. 688; *Blake v. Wheadon*, 2 Hay. 109. See also *Sherwood v. Barton*, 36 Barb. 284; *Fulton v. Williams*, 11 Cush. 108; *Temple v. Seaver*, *supra*.

DANIEL B. STEVENS v. WILLIAM BEALS.

(10 Cushing, 291. Supreme Court of Massachusetts, October, 1852.)

Indorsement by wife with consent of her husband. — A wife, with the consent of her husband, may indorse in her own name a promissory note made payable to her during coverture, and pass a good title to the indorsee.

ASSUMPSIT by the indorsee against the maker of the following promissory note: "Lowell, June 8, 1848. For value received, I promise to pay Lydia H. McFarland, or order, \$150 on demand with interest. William Beals."

At the trial in the Court of Common Pleas, it appeared that at the date of the note the payee was a married woman, living in this Commonwealth with her husband; that her husband wrote the

note, and always permitted his wife afterwards to retain possession of it. There was evidence tending to show that the defendant had promised, in presence of the payee's husband, to pay this note to the wife, whenever she wanted the money; and that the money loaned to the defendant at the time of giving the note, was given to the wife by the husband, at the time of their marriage, and had been used and loaned by her ever since. The note was indorsed by the wife in her own name, and she testified that her husband had given her the fullest assent to do as she pleased with the note, and that she was to have the note as her own; that the defendant had promised her repeatedly to pay the note.

The defendant objected that, by the indorsement of the wife no legal title passed to the indorsee, and that this action could not be maintained. But the presiding judge, *Mellen, J.*, ruled that the wife, with the assent of the husband, could indorse the note so as to pass the property in it to the indorsee.

BIGELOW, J. Two objections only have been insisted on by the defendant in support of the exceptions in this case. The first relates to the authority of the wife, upon the facts reported, to indorse the note in suit in her own name, and thereby vest a good title thereto in the plaintiff. There can be no doubt, that the note, having been given after marriage and during coverture, although payable to the wife, was the absolute property of the husband, and he could pass the title thereto by his own sole indorsement. The authorities in this country are concurrent to this point. Bingham on Inf. & Cov. 213, note. We think it is equally clear, that a note made payable to the wife during coverture, when indorsed by the wife in her own name, with the assent and authority of the husband, passes by a good title to an indorsee; but that without such assent and authority no title passes by her indorsement. The cases all turn upon this distinction. In the leading case of *Barlow v. Bishop*, 1 East, 433, which decides that a married woman cannot indorse a note made payable to her in her own name, so as to pass a valid title thereto, proof of the authority or assent of the husband was wanting. Subsequent decisions have fully recognized this distinction; and it is now the well-settled rule of law that the assent or authority of the husband gives validity to the wife's indorsement, and enables her to pass a good title to choses in action made payable to her during coverture.

The principle upon which this distinction rests is this: The coverture of the wife creates an incapacity and disability in her to make a valid contract. The assent of the husband removes this disability or supplies the want of capacity. She then becomes to a certain extent the agent of the husband, who is bound by her acts when done in pursuance of the authority conferred by him. Chitty, Bills, 21, 200, 201; 2 Bright, Husband and Wife, 42; Cotes v. Davis, 1 Camp. 485; Prestwick v. Marshall, 7 Bing. 565, and 4 Car. & P. 594; Prince v. Brunatte, 1 Bing. N. C. 435; Miller v. Delamater, 12 Wend. 433.

The case of Savage v. King, 5 Shep. 301, which was cited and relied on by the defendant, is in conflict with the other authorities upon this point. The Court put their decision in that case mainly upon the authority of Barlow v. Bishop, without advertng to the distinction created by proof of the assent of the husband to the indorsement, which seems to have escaped the attention both of the counsel and the Court. We cannot, therefore, yield our assent to the authority of that case.

It was urged by the counsel for the defendant as a strong argument against the recognition of the rule of law giving effect to the wife's indorsement, when assented to and authorized by the husband, that it might in some cases operate very greatly to the prejudice of the rights of a promisor. The argument was this: The note being given to the wife during coverture, the property in it vests absolutely in the husband, and he can sue in his own name upon it; the indorsement of the note by the wife in her name *ex proprio vigore*, would pass no title to it; and therefore the recovery by the indorsee of the wife would be no bar to another recovery by the husband, unless the promisor could show the assent of the husband to her indorsement, which he might not be able to do, because the wife in an action by the husband on the note, could not be called by the promisor as a witness to prove it. But it seems to us, that this argument entirely overlooks the effect of a recovery on the note by the indorsee of the wife. The rule of law being that such indorsement is inoperative without the husband's assent, and passes no title to the indorsee, a recovery by such indorsee necessarily implies the husband's assent and authority, without which no recovery on it could have been had. The indorsement, therefore, of the wife, under such circumstances, is equivalent to that of the husband. Her act becomes in law his

act. The person recovering a judgment as indorsee on such a note, must claim through her husband by a title derived from him and in privity with him. He thereby becomes bound by the judgment recovered against the promisor, who can well plead it in bar, in a suit brought on the same note against him by the husband.

In the case at bar, the authority and assent of the husband of the payee to the wife's indorsement were abundantly proved, and the instructions of the Court upon this part of the case, were entirely correct and in conformity with the authorities above cited.

Upon the other point in this case — that the allegation in the writ that the note was indorsed to the plaintiff before the commencement of suit, is not legal evidence of its truth — the exceptions of the defendant were sustained, and a new trial granted.

The question decided in the principal case respecting indorsements by married women arose again in Maine, in 1856, in the case of *Hancock Bank v. Joy*, 41 Maine, 568. That was an action upon a bill of exchange payable to the order of the defendant's wife, and by her indorsed by authority of her husband. He was held liable by a unanimous court. The principal case is cited as authority for the decision.

In *Savage v. King*, 17 Maine, 301, disapproved by Chief Justice *Bigelow, supra*, it was not proved that the wife acted for her husband at the time of her indorsement. It is cited to this effect in *Hancock Bank v. Joy, supra*.

The rule in the principal case is also the law in Pennsylvania. See *Reakert v. Sanford*, 5 Watts & S. 164; *Leeds v. Vail*, 15 Penn. State (3 Harris), 185. Also probably in Delaware. See *Fredd v. Eves*, 4 Harr. 385. The same is held again in England in *Lindus v. Bradwell*, 5 Com. B. 583, and may be considered as established beyond question.

HOLDER FOR VALUE.

BAY v. CODDINGTON *et al.*

(5 Johnson's Ch. 54. Court of Chancery of New York, 1821.)

Note delivered as security for contingent liability. — A, the agent of B, received negotiable notes to be delivered to B, but delivered them to C, as security for responsibilities incurred by C in indorsing accommodation paper for himself, A. C had not then become chargeable on his said indorsements. *Held*, that C was not a *bona fide* holder for value, though he did not know that the delivery of the notes to himself by A, was fraudulent, but believed A to be the real owner of them.

THE plaintiff being owner of a vessel, employed Randolph and Savage, defendants, who were carpenters, to sell her on a credit, and take good notes in payment, and transmit the same to him, with an account of their charges, which he would pay. R. and S. sold the vessel for \$3875, and on the third of June, 1819, received the notes of the purchasers, payable in two, three, and four months: some of them being made payable to, and indorsed by, P. Aymar & Co., and the others by J. R. Stewart. On the twelfth of June, 1819, R. and S. delivered the notes so indorsed, to the defendants, J. and C. Coddington, who, were, at that time, as they stated in their answer, under heavy responsibilities for R. and S., as indorsers of notes for their accommodation, payable at different times, but all subsequent to the twelfth of June, 1819, and which they were afterwards obliged to take up, as they fell due, amounting to above \$17,000. The answers admitted that R. and S. had stopped payment, when the notes so held by them were to be delivered to J. and C. Coddington.

The defendants, J. and C. Coddington, denied all knowledge of the manner in which the notes had come to the hands of R. and S., and alleged that they believed that they were the *bona fide* and exclusive property of R. and S.; that they received these notes

with others, as a guaranty and indemnity, as far as they would avail, for their responsibilities; and three days after, disposed of some of the notes for cash, and did not know, until several days afterwards, that the notes belonged to the plaintiffs, as stated in the bill. They admitted that when they so received the notes, R. and S. were not, in a strict legal sense, indebted to them; but that they were under large gratuitous responsibilities for them.

No proofs were taken, and the cause came on to be heard on the pleadings only.

KENT, CHANCELLOR. It is admitted that Randolph and Savage held the notes belonging to the plaintiff, and which they transferred to the defendants, J. and C. Coddington, on the twelfth of June, 1819, as agents or trustees for the plaintiff, and that they had no authority to pass them away. It was a gross and fraudulent abuse of trust, on the part of R. and S. The only question now is whether J. and C. C. are entitled, under the circumstances disclosed, to hold the notes, and retain the amount of them as against the plaintiff.

Negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But the defendants, J. and C. C., have not entitled themselves to the protection of holders of that description. The notes were not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created or responsibility incurred, on the strength and credit of the notes. They were received from R. and S., and after they had stopped payment and had become insolvent within the knowledge of J. and C. C., and were seized upon by the Coddingtons, as *tabula in naufragio*, to secure themselves, against contingent engagements previously made for R. and S., and on which they had not then become chargeable. There is no case that entitles such a holder to the paper, in opposition to the title of the true owner. They were not holders for a valuable consideration within the meaning or within the policy of the law.

In *Miller v. Race*, 1 Burr. 452, a bank-note was stolen, and came to the hands of the plaintiff, and he was held entitled to it. But

the Court of King's Bench considered bank-notes as cash, which passed as money in the way of business; and the holder, in that case, came by the note, for a full and valuable consideration, by giving money in exchange for it, in the usual course of his business, and without notice of the robbery, and on those considerations he was entitled to the amount of the note. So, in *Grant v. Vaughan*, 3 Burr. 1516; 1 W. Black. 785, a bill of exchange payable to bearer, was lost, and the finder paid it to a grocer for teas, and took the change. There the Court laid stress on the facts that the holder came by the bill *bona fide*, and in the course of trade, and for a full and fair consideration, and that though he, and the real owner were equally innocent, yet he was to be preferred, for the sake of commerce and confidence in negotiable paper. Again, in *Peacock v. Rhodes*, 1 Doug. 633, a bill of exchange, with a blank indorsement, was stolen and negotiated to a person who took it in the way of his trade, for cloth sold and cash for the balance, and he was held entitled to hold it. Lord *Mansfield* placed reliance on the circumstance that it was received in the course of trade. It was "by reason of the course of trade, which creates a property in the assignee or bearer," that *Holt*, C. J., 1 Salk. 126, Anon., held, that the owner of a bank-bill which was lost and transferred by the finder to C, for a valuable consideration, could not maintain an action against C. It will not be necessary to go further in support of the principle which uniformly pervades the cases upon this point, and I shall conclude with the case of *Collins v. Martin*, 1 Bos. & Pul. 648, in which it was decided, that if bills of exchange, indorsed in blank, be deposited with a banker, to be received when due, and the banker raises money on them, by pledging them to C, and then becomes bankrupt, C could not be sued by the real owner, as he took them innocently, without knowledge of the previous circumstances. But it is to be observed that C there advanced money to the banker, on the credit of the bills, and, as C. J. *Eyre*, observed in that case, "If it can be proved that the holder gave no value for the bill, then, indeed, he is in privity with the first holder, and affected by all that will affect him."

In short, I have not been able to discover a case in which the holder of negotiable paper, fraudulently transferred to him, was deemed to have as good a title, in law or equity, as the true owner, unless he received it not only without notice, but in the course of

business, and for a fair and valuable consideration given or allowed on his part, on the strength of that identical paper. It is the credit given to the paper, and the consideration *bona fide* paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it.

I shall accordingly declare, that the defendants, J. and C. Coddington, are not entitled to the notes or the proceeds thereof, as against the plaintiff, who was the lawful owner of them when they were transferred to those defendants, inasmuch as they did not receive the notes in the course of business, nor in payment, in whole or in part, of any then existing debt, nor for cash or property advanced, or debt created, or responsibility incurred on the credit of the notes. And I shall direct that it be referred to a master to compute the amount of the said notes, with interest thereon from the times they were respectively payable, to the time of making the report; and that all the defendants in the amended bill, or some or one of them, pay to the plaintiff the sum that shall be reported as the amount of the said notes, with interest, as aforesaid, within thirty days after the master shall have made and filed his report, and notice thereof, and of this decree, or that the plaintiff may have execution therefor, against all or either of the said defendants, according to the course and practice of the Court.

And it is further ordered, that the defendants, R. and S., pay to the plaintiff his entire costs of this suit, to be taxed, including the costs of the original bill, and that the plaintiff give credit upon the costs so to be taxed, the charges and commissions due from him to the said defendants, R. and S., upon the sale of the vessel in the pleadings mentioned, and amounting to \$96.87; and that he have execution for the balance of costs, after such deduction, against them, the said R. and S. according to the course and practice of the Court. And it is further ordered that no costs be taxed or allowed to the plaintiff, or to the defendants, J. and C. C., as against each other.

Decree accordingly.

This case was affirmed in the Court of Errors, in 1822, 20 Johns. 637. See *post*, note to *Swift v. Tyson*, 195.

STALKER v. M'DONALD *et al.*

(6 Hill, 93. Court of Errors of New York, December, 1843.)

Paper taken as security for antecedent debt.—One who takes a note merely as collateral security for an antecedent debt, without advancing any thing upon it, or relinquishing any security, is not a holder in the due course of trade.

TROVER for the alleged conversion of two promissory notes by Stalker. He came by the notes in this way: The firm of Gillespie and Edwards, who were in debt to Stalker on a certain note which they found they could not pay, prevailed upon Stalker to withdraw it by delivering to him the notes in question as security, for a promise which they then made to pay their note in a short time. This firm stopped payment and failed, without paying their indebtedness to Stalker. The two notes in controversy were paid to Stalker.

WALWORTH, CHANCELLOR. The object of this writ of error appears to be to induce this Court to overrule its decision in the case of Coddington v. Bay, 20 Johns. 637, and to make our decision conform to the opinion of Mr. Justice *Story* in the recent case of Swift v. Tyson, 16 Peters, 1,¹ decided by the Supreme Court of the United States. Upon questions arising under the Constitution and laws of the United States, and upon the construction of treaties, the decisions of that high tribunal are binding upon the State courts: and we are bound to conform our decisions to them. But in questions of local law, and in the construction of the Constitution and statutes of the State, the decisions of the highest Court of judicature of the State are the evidence of what the law of the State is; and are to be followed in preference to those of any other State or country, or even of the United States. On a question of commercial law, however, it is desirable that there should be, as far as practicable, uniformity of decision, not only between the courts of the several States and of the United States, but also between our courts and those of England, from whence our commercial law is principally derived, and with which country our commercial intercourse is so extensive. I have, therefore,

¹ *Post*, 186

thought it my duty to re-examine the principles upon which the decision of this Court in *Coddington v. Bay* was founded, notwithstanding it was deliberately made, with the concurrence of at least one of the ablest judges who has ever adorned the bench of this State, and has been acquiesced in and followed by all the courts of the State for more than twenty years. And I have done it not only out of respect to the decision actually made by the Supreme Court of the United States in the case alluded to, but also because the opinion of the distinguished judge who pronounced its decision, is of itself entitled to very great weight upon a question of commercial law; although what he said in that case respecting the transfer of a negotiable note as a mere security for the payment of an antecedent debt was not material to the decision of any question then before the Court, and is therefore not to be taken as a part of its judgment in that case.

In *Coddington v. Bay*, this Court did not, so far as I have been able to discover, run counter to any decision which had ever been made in this State or in England, previous to that time. For the decision admits that the *bona fide* holder of negotiable paper, who has received it for a *valuable* consideration, without notice or reasonable ground to suspect a defect in the title of the person from whom it was taken in the usual course of business or trade, is entitled to full protection. But that where he has received it for an antecedent debt, either as a nominal payment or as a security for payment, without giving up any security for such debt which he previously had, or paying any money or giving any new consideration, he is not a holder of the note for a *valuable* consideration, so as to give him any equitable right to detain it from its lawful owner. This principle, of protecting the *bona fide* holder of negotiable paper, who has paid value for it, or who has relinquished some available security or valuable right on the credit thereof, is derived from the doctrines of the courts of equity in other cases where a purchaser has obtained the legal title without notice of the equitable right of a third person to the property. It has been uniformly held by the courts of equity in such cases that the purchaser who has obtained the legal title as a mere security or payment of a pre-existing debt, without parting with any thing of value, is not entitled to hold the property as against the prior equitable owner. And if he has paid but a part of the consideration, or value of the property, he is only entitled to be

considered as a *bona fide* purchaser *pro tanto*. This last principle was applied by one of the courts in England to the purchaser of a negotiable note, where the indorser of a note for £100, by his replication to the plea that it was indorsed to him without consideration, stated that it was indorsed to him for the consideration of £49; and he was only permitted to recover that amount against the defendant, from whom the note had been obtained by the indorser without consideration. *Edwards v. Jones*, 7 Car. & Payne, 633.

It is somewhat singular that Mr. Justice *Story* should rely upon the opinion of Chancellor *Kent* in the case of *Bay v. Coddington*, 5 Johns. Ch. 54, as evidence that the decision of this Court sustaining his opinion, and affirming his decree in the same case, was a departure from the law of this State as previously settled. And the previous case of *Warren v. Lynch*, 5 Johns. 239, is not in conflict with the decision of this Court: nor does it decide that a pre-existing debt is a sufficient consideration to protect the holder of a negotiable note which was not valid as between the original parties, against the equitable rights of the maker of the note, or against the rights of a previous owner. For the note in that case was given by Lynch for a valid and subsisting debt by the one to whom the debt originally belonged. Although it was taken in the name of another person, that person indorsed it in blank for the purpose of enabling the person to whom the debt belonged to negotiate it: and it was then transferred to the plaintiff, immediately for aught that appears, partly in payment or security of a pre-existing debt. The question then arose whether other creditors of the former owner of the note were not entitled to it, as being still the property of Rose, the original owner, or of Robertson, the indorser. What is said, therefore, as to the pre-existing debt, is merely as to its being a sufficient consideration as between the plaintiff and Rose, from whom the plaintiff received the note. For if the transfer was valid as between them, the creditors of Rose, who were also endeavoring to obtain payment of a pre-existing debt merely, acquired no right to the money due on the note, by their subsequent suit in the nature of a foreign attachment in the State of Virginia. The case of *Birdseye v. Ray*, 4 Hill, 159, cited by the plaintiff's counsel on the argument, is a case of the same character. For both claimants in that case were endeavoring to obtain preference in payment of pre-existing debts.

And the Court decided that one of them who had secured a specific lien upon the property by purchase from the owner, before the other creditor's execution was actually levied thereon, was entitled to hold it as against the execution, under the provision of the statute on that subject. In other words, that, as between creditors having equal equities, the debtor may lawfully prefer one to the other, before an actual levy upon his property has been made.

There is no doubt that the cases of *Wardell v. Howell*, 9 Wend. 170; *Rosa v. Brotherson*, 10 id. 85; *Ontario Bank v. Worthington*, 12 id. 593; and *Payne v. Cutler*, 13 id. 605, in the Supreme Court of this State, and of *Francia v. Joseph*, 3 Edw. Ch. 182, before the Vice-Chancellor of the first circuit, follow the decision of this Court in the case of *Coddington v. Bay*. And they fully establish the principle that to protect the holder of a negotiable security which has been improperly transferred to him in fraud of the prior legal or equitable rights of others, it is not sufficient that it has been received by him merely as a security or nominally in payment of a pre-existing debt, where he has parted with nothing of value, nor relinquished any security upon the faith of the paper thus improperly transferred to him without any fault on his part. I may also add that many other decisions to the same effect have been made in this State, in the different courts of law and equity, within the last twenty years; although most of them have not been reported.

It is supposed, however, by the learned judge who delivered the opinion of the Supreme Court of the United States in the case before alluded to, that this strong column of decisions, supported as it is by the decree of Chancellor *Kent* in the case of *Bay v. Coddington*, by the opinions of Chief Justice *Spencer* and Justices *Woodworth* and *Platt* in that case, and by every judge who has occupied a seat upon the bench of the Supreme Court since 1822, has been greatly shaken, if not entirely overturned, by two recent decisions of the Supreme Court. That the judges who made those two decisions do not themselves so understand them, however, is evidenced by the fact that they have given judgment in the case now under consideration, in conformity with the principle of the decisions which they are supposed to have overruled. And I have not been able to discover any thing in the opinions of the Court, as reported in the cases of *The Bank of Salina v. Babcock*, 21 Wend. 499, and the *Bank of Sandusky v. Seoville*, 24 id.

115, which necessarily conflicts with any previous decision of the Supreme Court upon the question now under consideration. In the first case, the note was discounted at the bank in the ordinary way. And the proceeds thereof were applied, by the authority of the persons for whom it was discounted, to pay up and cancel three other notes which were then due to the bank; upon two of which notes, amounting to nearly the whole of such proceeds, there was a responsible indorser. The Court held that the effect of the transaction was the same as if the parties for whose benefit the note was discounted had actually received the money therefor, and had afterwards applied it to pay and discharge the notes then due; and that the indorser upon those notes was discharged from his liability. In the second case, the question arose under the usury law as contained in the revised statutes, which protects usurious notes in the hands of an indorsee or holder who shall have received the same in good faith, and for a *valuable* consideration. 1 R. S. 172, § 5. And the Court considered the transaction the same as though the money had been actually paid to the person for whose benefit the usurious note was discounted, and he had then applied it in payment of the former note: so that the original indebtedness was extinguished, and the bank had no other remedy to recover their money except upon the note which was alleged to have been originally tainted with usury. The question in that case was, whether the transaction was equivalent to an actual payment of the money for the usurious note, so as to make the bank a *bona fide* holder for a *valuable* consideration; and not whether giving the note for a pre-existing debt was a payment of value. Under a similar provision in the English statute it has been decided that a negotiable note tainted with usury was invalid in the hands of an innocent party, who had merely taken it in payment of an antecedent debt. Vallance v. Siddel, 2 Nev. & Per. 78. There is nothing in the reports of our own State then, which is in conflict with the principle established in Coddington v. Bay in this Court, that, to protect the holder of a negotiable security which has been passed to him in fraud of the rights of others, he must not only have taken it without notice, but must also have parted with something of actual value, upon the credit or faith thereof; and that merely receiving it in security or payment of an antecedent debt, where by the settled rules of equity he would not be protected as a *bona fide* purchaser of property in other cases, is not sufficient.

Nor have I been able to find an actual decision in the English reports which is in conflict with the uniform course of decisions on this subject in this State. On the contrary, the English judges, when speaking on this subject, generally use the words *valuable consideration*, in contradistinction from a mere *valid* or sufficient consideration as between indorser and indorsee. And that receiving the note in payment or security of a pre-existing debt merely, is not understood as receiving it for a *valuable* consideration, in legal language, is evident from the decision of the case of Vallance *v.* Siddell, to which I have just referred.

I think the learned judge was under a mistake in supposing that this question arose in England, and was decided in the case of *Rose v. Van Mierop*, 3 Burr. 1663. That was a suit brought against defendants who had actually agreed with the plaintiffs to honor their drafts for money previously advanced by them to a third person. And the only question was, whether the indebtedness of a third person was a sufficient consideration for the written promise of the defendants to accept the bills on his account. One of the earliest English cases upon the question which we are considering, is the anonymous case before Chief Justice *Holt*, in 1698; where a bank-note payable to bearer was lost, and the finder passed it for a valuable consideration. In an action of trover brought by the loser against the person to whom it was thus passed, his lordship decided that the action did not lie against the defendant, because he had the note for a *valuable* consideration. 1 Ld. Raym. 738; 1 Salk. 126, S. C. The next in order of time was the case of *The Ex'rs of Devallar v. Herring*, in 1727, 9 Mod. 45; where an annuity ticket was lost or stolen, and, after passing through several hands, came to Herring, the defendant, who purchased it for a valuable consideration. And it was decided that he was entitled to it, upon the ground that it had come to his hands *bona fide*, and for a *valuable* consideration. In *Haly v. Lane*, 2 Atk. 181, which came before Lord *Hardwicke* in 1741, he thus lays down the rule: "Where there is a negotiable note, if it comes into the hands of a third or fourth indorsee, though some of the former indorsees might not pay a *valuable* consideration, yet if the last indorsee gave money for it, it is a good note as to him; unless there should be some fraud or equity against him appearing in the case." The same principle of protecting the holder of a negotiable instrument, if received by him in the course of trade,

and for a *valuable* consideration, was recognized in the opinion of the Court of King's Bench, in 1753, while Chief Justice *Lee* presided in that Court. *Maelish v. Ekins*, Say. 73. Then followed the case of *Miller v. Race*. 1 Burr. 452, before Lord *Mansfield* and his associates in 1758, where a bank-note was stolen from the mail and came into the hands of the plaintiff, as the report states, for a full and valuable consideration, in the usual course and way of his business, and without any notice or knowledge that it had been taken from the mail; but upon presenting it at the bank for payment, it was detained by the defendant, who was a clerk therein. And the decision of the Court was in conformity with what is now understood to be the settled law both in that country and in this. But that Lord *Mansfield* understood the holder must have given a *valuable* consideration for the note to entitle him to protection, is evident from what is said in his opinion in answer to a case cited by the defendant's counsel as having been decided by Lord *Holt* in 1700. In reference to that case, he says: "But Lord Chief Justice *Holt* could never say that an action would lie against a person who, *for a valuable consideration*, had received a bank-note which had been stolen or lost, and *bona fide paid to him*, even though an action was brought by the true owner; because he had determined otherwise but two years before; and because bank-notes are not like lottery tickets, but money." And the words "for a valuable consideration," as well as "*bona fide paid to him*," are italicized in the opinion of Lord *Mansfield*, to show that both are material and necessary to protect the holder of a note against the claim of the former owner thereof. This is also in accordance with what he actually did in the case of *Grant v. Vaughan*, 1 W. Black. 485; 3 Burr. 1516, S. C., which was tried before him six years afterwards. There a bill of exchange payable to bearer was lost, and was found by a stranger to the plaintiff, who gave it to the plaintiff upon the purchase of a parcel of teas, and received the change, after the plaintiff had made inquiry and ascertained that the drawer of the bill was a responsible person. And Lord *Mansfield* submitted it to the jury to decide, 1st. Whether the plaintiff came by the bill *bona fide* for a *valuable* consideration; and 2d. Whether such bills payable to bearer were negotiable. The jury having found a verdict for the defendant, a new trial was granted: not upon the ground that the first direction was wrong, but because his lordship had erred in submitting the question as to the negotiability of such

a bill to the jury, as a question of fact. And in answering the objection raised by counsel to the negotiability of drafts payable to bearer, that it would be dangerous, because upon a casual loss the finder might maintain an action upon them as bearer, he again says: "but the bearer must show it came to him *bona fide* and upon *valuable* consideration." The next case was that of *Peacock v. Rhodes*, 2 Doug. 633, which came before the same Court in 1781, while Lord *Mansfield* still presided there. In that case a suit was brought against the drawers of a bill which had been indorsed in blank and was stolen, and had been passed to the plaintiff by a stranger professing to be the owner thereof, for its value, in payment of cloth and other articles in the way of the plaintiff's trade as a mercer, and partly for cash. And the case was decided in conformity with the previous decisions. But I do not find an intimation in this, or in either of the previous cases, that if the person who received the note or bill had merely taken it in payment or security of an antecedent debt, without having parted with any thing of value on the credit or faith thereof, he would have been entitled to hold the note or bill against the former rightful owner. On the contrary, we may infer what Lord *Mansfield's* opinion would have been upon the question of applying it in payment of a precedent debt, from what he actually decided in 1777, in the case of *Buller v. Harrison*, 2 Cowp. 565. There, money had been paid to an agent under a misapprehension of facts, and had been passed by him to the credit of his principal, in satisfaction of a previous indebtedness, before he had any notice or suspicion that the money was not justly and equitably due to such principal. And his lordship decided that the agent must refund the money, and resort to his principal to recover what was due to him before the money was so applied; that, as no new credit was given, he had not been legally prejudiced; and that applying the money to pay the precedent debt, was not equivalent to paying it over to his principal before he had notice of the plaintiff's equitable rights.

In the case of *Collins v. Martin*, 1 Bos. & Pul. 648, which came before the Court of Common Pleas in England, in 1797, the bills had been pledged by the plaintiff's bankers with the defendants upon an advance of money thereon. The only question there was, whether a banker with whom a negotiable security had been deposited for collection, could pledge it to a *bona fide* holder, for money advanced to him on the credit thereof.* And it was decided he

could. But in that case the principle is again recognized, that to protect the holder of a negotiable instrument against the former owner, where it has been fraudulently transferred, he must be a holder thereof for value. For C. J. *Eyre* says, "if it can be proved that the holder gave *no value* for the bill, then indeed he is in privity with the first holder, and will be affected by every thing which would affect the first holder." And in the case of *Lowndes v. Anderson*, 13 East, 130, which was decided in 1810, the question was, whether the defendants, who gave up a valid security which had been remitted to them in payment of a balance and to meet acceptances for a bankrupt, were answerable to his assignees for money and bills which they had received from a stranger in payment of such security, although it turned out afterwards that such money and bills belonged to the bankrupt: but which fact was concealed from their knowledge by the secret agent employed by him to transact the business. In that case again, the necessity of a valuable consideration is recognized by C. J. *Ellenborough*. For in delivering the opinion of the Court, he says, "it would be a grievous inconvenience if bank-notes could be followed, in the manner now attempted, through the hands of *bona fide* holders for a *valuable* consideration without notice."

I have carefully examined the several subsequent cases, relied upon in the opinion of Mr. Justice *Story* in *Swift v. Tyson*, to show that the decisions of the courts in England are in conflict with the settled law of this State upon the question now under consideration; and as I understand those cases, only two of them, and these by implication merely, conflict in any degree with our decisions. I believe I have also examined every reported decision on the subject, down to the present time, in the English reports which have reached this country; though it is possible that some have escaped my researches. And I do not find another case, or *dictum*, in hostility to the principle as settled by this Court in the case of *Coddington v. Bay*. The English cases subsequent to 1810, referred to by Mr. Justice *Story* as containing a contrary doctrine, are the cases of *Bosanquet v. Dudman*, 1 Stark. 1; *Ex parte Bloxham*, 8 Ves. 531; *Heywood v. Watson*, 4 Bing. 496; *Bramah v. Roberts*, 1 Bing. N. C. 469; and *Percival v. Frampton*, 2 Cromp., Mees. & Roscoe, 180. In the first case it is evident there is a typographical error in substituting the word *but* for *who*, in the fifth line of the statement of the case by the reporter. The suit was brought by the

indorsees of a bill drawn by Rains upon the defendant, payable to his own order, and indorsed by him, and which had been accepted by the defendant. Clarkson & Co., who were the owners of the bill, and who kept an account with the plaintiff's bankers in London, deposited the bill with them as collateral security for such acceptances as they might make. And at the time the bill became payable, on the fifth of February, 1812, the plaintiffs were the holders of it, and had at that time accepted bills to a much larger amount than the cash balance in their hands. They were therefore undoubtedly entitled to hold it as against Clarkson & Co., for the excess of such acceptances beyond the cash balance. But as they held other collateral securities to a considerable amount, when this bill was dishonored they returned it to Clarkson & Co. They subsequently remitted it again to the plaintiffs, requesting them to hold it for Clarkson & Co., and to place the same to their account when paid; and the plaintiffs continued to hold the bill until Clarkson & Co. became bankrupts. Upon the trial of the cause, the defendant's counsel was proceeding to cross-examine the witness as to the comparative amount of the cash balance and collateral securities, and the amount of the acceptances on account of Clarkson & Co. at the time the bill fell due; with a view, I presume, to show that the cash and other collateral securities were more than enough to meet all their acceptances, and that they had no lien upon this particular bill at that time, but that it belonged to Clarkson & Co. And it was in reference to that cross-examination, as I understand the case, that Lord *Ellenborough* said he should hold that where collateral securities were placed in the hands of a banker, under such circumstances all the collateral securities were held for value, whenever acceptances should be made from time to time, upon the credit and faith of such collateral securities, beyond the cash balance in the hands of the bankers. In other words, that it was immaterial how much the collateral securities amounted to. For if the acceptances which had thus been made on the faith of them, exceeded at any time the cash in hand to meet such acceptances, the bankers were holders of all the collateral securities for value, to secure the payment of the deficiency; and neither the depositors nor their assignees in bankruptcy could claim a return of any part of such securities, or prevent the bankers from collecting the money on them, to meet such deficiency. This was unquestionably good law, and is not a decision that, where a bill is fraudulently deposited

with a banker in payment or security of a pre-existing debt, he is a *bona fide* holder thereof for value, as against the party defrauded. And if the remark of his lordship in that case meant any thing else, it is impossible to tell from the report what he did mean. For there was no claim or pretence that the bill in question did not belong to Clarkson & Co. at the time it was deposited with the plaintiffs, and when it fell due; although as between Rains, the drawer and indorser, and the defendant, the acceptor, it was a mere accommodation bill. Whether his lordship was right in holding that the return of the bill to the plaintiffs, after it was dishonored and had been paid to Clarkson & Co. by the drawer, who was in equity bound to pay it, restored the plaintiffs to all their former rights as against the accommodation acceptor, is an entirely different question. And if the reporter is right in his statement of the facts, I think I should have decided, in such a case, that the plaintiffs could not recover against the accommodation acceptor, or against Rains the drawer, even if they had paid the whole amount of the dishonored bill, in money, to Clarkson & Co., upon the return thereof. Nothing further, however, is necessary to be said, in reference to this very imperfectly reported case, than that it decides nothing upon the question now under consideration.

In *Ex parte* Bloxham, Lord *Eldon* merely decided that where bills and securities are remitted to a banker by his customer, to meet acceptances which the banker may make from time to time for his customer, such banker, as between him and his customer, has a general lien thereon for the amount of his acceptances for the customer. And that though some of the acceptances had not become due at the time the customer became a bankrupt, the banker was entitled to prove, under the commission, the amount for which he was liable upon the acceptances for the bankrupt. But that in making such proof to cover the acceptances, the proof must be made on the securities upon which the bankrupt's name appeared, and not upon a cash balance against the bankrupt which did not exist until after the bankruptcy. If there is any thing in that decision which has the least bearing upon the question now under consideration, I am not able to discover it.

In *Heywood v. Watson*, the defendant and Morrall were copartners, and obtained permission to overdraw their account with the plaintiffs, their bankers, from time to time, to the extent of £2000; for which amount Morrall gave his promissory note to the plaintiffs

as collateral security. The next day he received from the defendant, his partner, a note payable to himself or order, for one-half of that amount, to meet his note as collateral security to the plaintiffs for their advances, and to secure to him the repayment of the defendant's moiety of such advances, or so much as he should individually have to pay the plaintiffs on account of the firm. The partnership was dissolved about a year afterwards; at which time the plaintiffs had made advances for the firm to the amount of £1300, which neither of the partners had paid. Morrall had afterward transferred the defendant's note to the bankers. But there was no evidence that he had done so without consideration, or that the plaintiffs knew for what the note was given. And the Court held that the plaintiffs were entitled to recover, whether they did or did not know for what the defendant's note was given. It is true, C. J. *Best* says, if there was a good consideration between Morrall and the plaintiffs, who were ignorant of the circumstances under which Morrall took the note, they were entitled to recover. But it is evident he said this in reference to the legal rule that the indorsee of a negotiable instrument is presumed to have paid value for it, until the contrary is shown; the *onus* of disproving which, according to the decisions of the English courts, is thrown upon the party contesting the right of the holder, except where the note or bill is proved to have been lost or stolen, or to have been obtained or put in circulation by fraud. What the Chief Justice said in that case is not even a *dictum*, much less a decision, in opposition to the principle of law as settled in this State. For there was not a particle of equity in favor of the defendant in that case; as he was legally liable to the plaintiffs as a partner, for the whole amount of their advances, even if his note had been turned out by Morrall on account thereof. And all he had to do was to pay up the amount of his note, and the other £300, if they required it, and then sue Morrall for what he had paid beyond his share.

The case of *Bramah v. Roberts* came before the Court upon questions arising upon the pleadings. The plaintiffs were the indorsees of a bill of exchange drawn and indorsed by W. Clare for £500, at three months, and accepted by the defendants. To the declaration on this bill the defendants pleaded *first*, the general issue; *secondly*, that it was accepted by them without value, was delivered by one of them to T. Hunt for a special purpose, and

that he fraudulently transferred the same to the plaintiffs, with notice of his want of authority, and that there was not any consideration or value given in good faith for the indorsement of the bill to them; and *thirdly*, that one of the defendants fraudulently accepted the bill, under a power to accept it for all the defendants for a special purpose, for a different purpose from what was intended, and that the other defendants received no consideration or value for such acceptance. To the *second* plea the plaintiffs replied, in substance, that before the bill became due it was indorsed and delivered to them fairly and *bona fide* for a good and *valuable* consideration, that is to say, for moneys advanced by and due and owing to them, the plaintiffs; and without notice of the matters stated in the second plea, or of the want of power on the part of Hunt to transfer the bill on his own account. To the *third* plea they replied substantially in the same manner, after denying the want of authority of one of the defendants to accept the bill for all of them. The defendants demurred specially to these replications, assigning as causes of demurrer that the plaintiffs had not stated with sufficient certainty what consideration or value was given for the bill, nor when or to whom the moneys were advanced, nor whether they were advanced at the time or had been previously advanced, nor whether the moneys advanced were sufficient to authorize them to recover the whole amount of the bill. The Court decided that the third plea was bad, as it only alleged that the defendants were defrauded of the bill, and that their acceptance was without consideration; but set up no want of consideration in the negotiation of the bill to the plaintiffs, or notice of the alleged fraud, at the time they received the bill. No question was therefore decided upon the sufficiency of the replication to that plea. As to the replication to the second plea, C. J. *Tindal* thought it was sufficient; that it was only necessary for the plaintiffs to deny notice of the want of authority of the person from whom they received the bill, and aver that it was given to them for a full and valuable consideration; and that the replication was sufficient to show there was a good consideration. He says, "*if money passed from the present indorsees*, it appears to me sufficient, as against the acceptors of a bill of exchange, to allege that the bill was received for money advanced by and due and owing to them," &c. And after referring to the case of a replication in which an averment that the plaintiff was parson, and took

for tithes, was construed in reference to the time of severance, he again says, "a person of plain understanding will interpret this in the same way, that there has been a money consideration passing from the plaintiffs." But the Chief Justice went further, and declared his opinion to be that if the replication had contained a simple denial of the allegation of a want of consideration, it would be sufficient. From his language in this case I should infer that he understood the law to be that the holders of the bill must have received the same for a valuable consideration at the time of the transfer. But I admit that Mr. Justice *Park* uses the words *valid consideration* in his opinion. He says, "If the bill of exchange was indorsed and delivered to the plaintiffs for a good and *valid* consideration, that is to say, for money advanced by and due and owing to the plaintiffs, and they say that at the time it was indorsed to them they had no notice whatever of the fraud, it must be taken that the bill was taken for some antecedent debt." From this it may perhaps be fairly inferred that he thought that was sufficient to enable the holder of the note to recover thereon, although no other available security for such antecedent debt was given up or discharged upon the faith and credit of the bill, at the time it was so received by the plaintiffs; but he does not say so. And Justice *Bosanquet* says, "I am disposed to think that the replication would have been quite sufficient if it had not added the words 'for money advanced by and due and owing to the plaintiffs,' thereby setting out the nature of the consideration; but that it was sufficient to say 'that after the bill was made, and before it became due and payable, on a specified day, the bill was indorsed and delivered to the plaintiffs fairly and *bona fide*, and for a full and *valuable* consideration.'" But whatever may have been the opinion of the judges who decided that case, under the new rules of pleading in England, and in reference to the fact that under any form of replication which did not admit a want of a sufficient consideration, the *onus* of proving that the bill was not passed to the plaintiffs for a good and sufficient consideration would be upon the defendants, I think it is not entitled to the weight of a judicial decision upon the question now under consideration.

In the other case, *Percival v. Frampton*, the defendant had indorsed the note for the accommodation of the maker thereof, to enable him to obtain money thereon generally. And he got it discounted by his banker, who placed the proceeds to his credit,

on which he afterwards drew out £198, and the residue was applied to the balance of his account. The Court held that this was equivalent to an advance of the money to him. So far the decision was in accordance with the case of *The Bank of Rutland v. Buck*, 5 Wend. 66, and other cases decided in this State. For, the object of the indorsement being to enable the maker of the note to raise money generally, and not for any specific object in which the indorser had an interest, it was wholly immaterial to him whether the note was passed to the credit of the maker with his banker, or the banker advanced him the money on the note and then received it back to make good his account, or the maker received the money from any other person upon the note, and then paid it to the plaintiffs for their debt. But in that case Mr. Baron *Parke* expresses the opinion that if the note had been given to the plaintiffs as security for a previous debt, and they held it as such, they might be properly stated to be holders for valuable consideration. From which I infer that his opinion corresponds with that of the Supreme Court of the United States upon the question now under consideration.

The question was raised by the counsel for the defendant in a subsequent case, *Bartrum v. Caddy*, 9 Adol. & Ellis, 275, that a by-gone debt is not a sufficient consideration to give a fraudulent assignee a title to recover. But as the judgment was given for the defendant upon other grounds, no opinion was expressed by the Court of Queen's Bench upon that point. And I do not think there is any decision in any court of England directly upon the question.

I have not had leisure to examine the reports of most of our sister States in reference to this subject. But in addition to the case from Connecticut referred to in the opinion of the Court in *Swift v. Tyson*, there are two decisions in the State of Maine, *Homes v. Smyth*, 4 Shepl. [16 Maine] 177, and *Norton v. Waite*, 2 Appl. [20 Maine] 175, in which it was held that the holder of a negotiable security who had received it in absolute payment of a pre-existing debt, without notice, was entitled to recover thereon, notwithstanding any failure or want of consideration, or other equities previously existing between other parties. But as I understand the opinion of Judge *Shepley* in the first of those cases, a party who takes a note or bill as collateral security for the payment of such a debt, and not in absolute payment and discharge of the same, will not be entitled to protection in that State against the rightful owner.

The decision of the Supreme Court of Pennsylvania in *Petrie v. Clark*, 11 Serg. & Rawle, 377, appears to be in accordance with the decision of Judge *Shepley* in *Homes v. Smyth*. For Judge *Gibson*, who delivered the opinion of the Court, says, if the note had been delivered in discharge of the debt, there would be no difficulty in saying, in the absence of collusion, that taking it in the usual course of business, as an equivalent for a debt which is given up, would be a purchase of it for a *valuable* consideration. But as it was given in pledge for *securing* an antecedent debt which was not discharged, but suffered to remain, and as it does not appear that money was advanced, or any act done that would in law be a present consideration, the case presented was against the plaintiff.

In the case under consideration, the notes which were improperly transferred by Gillespie in fraud of the rights of the owners, were not received by the plaintiff in error in payment or discharge of his debt, but as mere collateral securities for the payment thereof. He therefore would not be entitled to protection as a *bona fide* holder, for a valuable consideration, according to these decisions in the courts of our sister States. Nor do I think that the settled law of this State is so manifestly wrong as to authorize this Court to overturn its former decision for the purpose of conforming it to that of any other tribunal, whose decisions are not of paramount authority.

I must therefore vote to affirm the judgment of the Court below.

Lott, Senator. As a general rule, the true and rightful owner of property is entitled to recover it from any person in whose possession it may be, whether obtained by the latter under color of a purchase or otherwise. An exception, however, founded on principles of commercial policy, has been made in favor of the holder of negotiable paper, received in the usual course of trade, for a valuable consideration, though from a person having no right to make the transfer, and without notice of the fraud. Under such circumstances the right of the holder is allowed to prevail against the claim of the previous owner.

To bring a case within the exception, it is not enough to show that there was a consideration for the transfer, sufficient as between the holder and the party transferring, but the consideration must be such as the law denominates a *valuable* one. In *Coddington v. Bay*, 20 Johns. 637, a case decided by this Court, in which the

principle of the exception was fully discussed, Mr. Justice *Woodworth* said, "something must have been paid in money or property, or some existing debt satisfied, or some new responsibility incurred in consequence of the transfer; this would be paying value, and making out a consideration within the reason and meaning of the rule." Ib. 646. Chief Justice *Spencer* there remarked: "I understand, by the usual course of trade, not that the holder shall receive the bills or notes thus obtained, as securities for antecedent debts, but that he shall take them in his business, and as payment for a debt contracted at the time." Ib. 651. Mr. Senator *Vielie* observed that, "though indemnity for responsibilities is undoubtedly a good consideration for the sale or transfer of goods or negotiable paper, as against the party making it or his representatives, yet in none of the cases cited on the argument, and in no one that I have been able to find, has it ever been held to bar the true owner, upon a fraudulent transfer." Ib. 653. He added: "The true test I take to be, that when the holder is left in as good a condition, after a retransfer, as he would have been had no transfer taken place, there the title of the owner shall prevail. This allows the rule, so far as it is dictated by commercial policy, to have its full effect, while it protects the owner of negotiable paper, necessarily intrusted in the course of business to the care of agents, from an injury revolting to every principle of moral equity." Ib. 657.

If these doctrines are applicable to the case under consideration, and are to guide our decision, it appears to me the right of the defendants in error to the notes in question cannot be impeached.

It was contended on the argument, however, that the withdrawing of the note of Gillespie and Edwards from the bank, where it had been deposited for collection, caused a loss or prejudice to the plaintiff in error, which formed a sufficient consideration to entitle him to protection. It might be enough to say, in answer to this position, that the whole force of it is rebutted by the verdict of the jury; for under the charge of the Court, the verdict must be understood as having found that *no consideration was parted with by the plaintiff in error, on the credit of the notes in question*. But apart from this view of the case, it appears that the note of Gillespie and Edwards was merely lodged in the bank for collection, and that there were no indorsers to be charged. A protest was therefore unnecessary, and no injury or prejudice in that respect could have resulted from the act of withdrawing it. True, it is said in the testimony that,

after the note of Gillespie and Edwards was withdrawn, and before their failure, they paid "one or more notes in bank, in the regular course of business;" but the amount of these notes was not shown, nor did it in any manner appear that the note of the plaintiff in error would have been paid, had he suffered it to remain in the bank, although one of the firm of Gillespie and Edwards was examined as a witness upon the trial.

It should be remarked also that there was no stipulation or agreement by the plaintiff in error, on withdrawing his note from the bank, that he would not enforce payment of it. On the contrary, he had still a perfect right to demand its immediate payment, and to enforce his demand by action.

In every view which can be taken of this case, it appears to me the title of the defendants in error to the notes in question has not been divested, and that the judgment of the Court below ought to be affirmed.

On the question being put, "Shall this judgment be reversed?" all the members of the Court present, who heard the argument, except Strong, Senator, voted for affirming.

Judgment affirmed.

See following case and note.

JOHN SWIFT v. GEORGE W. TYSON.

(16 Peters, 1. Supreme Court of the United States, January, 1842.)

Paper taken in payment of pre-existing debt. — The *bona fide* holder of a bill of exchange, who has taken it before maturity, in payment of a pre-existing debt, without notice of any equities between the drawer and acceptor thereof, will not be affected by such equities.

Authority of the decisions of State courts. — The 34th section of the Judiciary Act (1 St. at Large, 92), is limited to the laws of a State strictly local: that is, to the positive statutes of the State and their interpretation by the local tribunals, and the rights and titles to things having a permanent locality, such as real estate. It does not apply to questions of general commercial law, such as bills of exchange and promissory notes.

THE case is stated in the opinion of the Court.

STORY, J. This cause comes before us from the Circuit Court of the Southern District of New York, upon a certificate of division of the judges of that Court.

The action was brought by the plaintiff, Swift, as indorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the first day of May, 1836, for the sum of \$1540.30, payable six months after date and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton indorsed to the plaintiff. The bill was dishonored at maturity.

At the trial, the acceptance and indorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared that Swift took the bill before it became due, in payment of a promissory note due to him by Norton and Keith; that he understood that the bill was accepted in part-payment of some lands sold by Norton to a company in New York; that Swift was a *bona fide* holder of the bill, not having any notice of any thing in the sale or title to the lands, or otherwise, impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record; but it does not seem necessary further to state them. The defendant then offered to prove that the bill was accepted by the defendant as part consideration for the purchase of certain lands in the State of Maine, which Norton and Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of the plaintiff to the bill of discovery. The judges of the Circuit Court thereupon divided in opinion upon the following point or question of law: Whether, under the facts last mentioned, the defendant was entitled to the same defence to the action, as if the suit was between the original parties to the bill, that is to say, Norton, or Norton and Keith, and the defendant; and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt that a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a *bona fide* holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defence, satisfactory proofs of the contrary, and thus to overcome the *prima facie* title of the plaintiff.

In the present case, the plaintiff is a *bona fide* holder without notice for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles, as by the express provisions of the 34th section of the Judiciary Act of 1789, c. 20. And then it is further contended that, by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments.

In the first place, then, let us examine into the decisions of the courts of New York upon this subject. In the earliest case, *Warren v. Lynch*, 5 Johns. 239, the Supreme Court of New York appear to have held, that a pre-existing debt was a sufficient consideration to entitle a *bona fide* holder without notice to recover the amount of a note indorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by

Mr. Chancellor *Kent*, in *Bay v. Coddington*, 5 Johns. Ch. 54.¹ Upon that occasion he said that negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But he added, that the holders in that case were not entitled to the benefit of the rule, because it was not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes; thus directly affirming, that a pre-existing debt was a fair and valuable consideration within the protection of the general rule. And he has since affirmed the same doctrine, upon a full review of it, in his commentaries. 3 Kent, Com. § 44, p. 81. The decision in the case of *Bay v. Coddington* was afterwards affirmed in the Court of Errors, 20 Johns. 637, and the general reasoning of the Chancellor was fully sustained. There were, indeed, peculiar circumstances in that case which the Court seem to have considered as entitling it to be treated as an exception to the general rule, upon the ground, either because the receipt of the notes was under suspicious circumstances, the transfer having been made after the known insolvency of the indorser, or because the holder had received it as a mere security for contingent responsibilities, with which the holders had not then become charged. There was, however, a considerable diversity of opinion among the members of the Court upon that occasion, several of them holding that the decree ought to be reversed, others affirming that a pre-existing debt was a valuable consideration, sufficient to protect the holders, and others again insisting that a pre-existent debt was not sufficient. From that period, however, for a series of years, it seems to have been held, by the Supreme Court of the State, that a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties in favor of the holders. But no case to that effect has ever been decided in the Court of Errors. The cases cited at the bar, and especially *Rosa v. Brotherson*, 10 Wend. 85; *The Ontario Bank v. Worthington*, 12 id. 593; and *Payne v. Cutler*, 13 id. 605, are directly in point. But the more recent cases, *The Bank of Salina v. Babcock*, 21 Wend. 499; and *The Bank of Sandusky v. Scoville*, 24 id. 115, have greatly shaken,

¹ *Ante*, 172.

if they have not entirely overthrown, those decisions, and seem to have brought back the doctrine to that promulgated in the earliest cases. So that, to say the least of it, it admits of serious doubt, whether any doctrine upon this question can at the present time be treated as finally established; and it is certain that the Court of Errors have not pronounced any positive opinion upon it.

But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this Court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this Court to follow the decisions of the State tribunals in all cases to which they apply. That section provides "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this Court have uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed

by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation ; as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intent and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court ; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord *Mansfield* in *Luke v. Lyde*, 2 Burr. 882, 887, to be in a great measure, not the law of a single country only, but of the commercial world. “Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.”

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due ; we are prepared to say, that receiving it in payment of, or as security for a pre-existing debt, is according to

the known usual course of trade and business. And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of, or as security for, pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

This question has been several times before this Court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt, for which the negotiable instrument is transferred to him, is a pre-existing debt, or is contracted at the time of the transfer. In each case, he equally gives credit to the instrument. The cases of *Coolidge v. Payson*, 2 Wheat. 66, 70, 73,¹ and *Townsley v. Sumrall*, 2 Pet. 170, 182, are directly in point.

In England, the same doctrine has been uniformly acted upon. As long ago as the case of *Pillans and Rose v. Van Mierop and Hopkins*, 3 Burr. 1663, the very point was made, and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us; for the bill of exchange, there drawn

¹ *Ante*, 43.

in discharge of a pre-existing debt, was held to bind the party as acceptor, upon a mere promise made by him to accept before the bill was actually drawn. Upon that occasion, Lord *Mansfield*, likening the case to that of a letter of credit, said that a letter of credit may be given for money already advanced, as well as for money to be advanced in future; and the whole Court held the plaintiff entitled to recover. From that period downward, there is not a single case to be found in England, in which it has ever been held by the Court, that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental *dicta* have been sometimes relied on to establish the contrary, such as the *dictum* of Lord Chief Justice *Abbott* in *Smith v. De Witts*, 6 Dowl. & Ryl. 120, and *De la Chaumette v. The Bank of England*, 9 Barn. & Cress. 208, where, however, the decision turned upon very different considerations.

Mr. Justice *Bayley*, in his valuable work on Bills of Exchange and Promissory Notes, lays down the rule in the most general terms. "The want of consideration," says he, "*in toto* or in part, cannot be insisted on, if the plaintiff, or any intermediate party between him and the defendant, took the bill or note *bona fide* and upon a valid consideration." Bayley, Bills, pp. 499, 500, 5th London edition, 1830. It is observable that he here uses the words "valid consideration," obviously intending to make the distinction, that it is not intended to apply solely to cases where a present consideration for advances of money on goods or otherwise takes place at the time of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go further, and establish that a transfer as security for past and even for future responsibilities, will, for this purpose, be a sufficient, valid, and valuable consideration. Thus, in the case of *Bosanquet v. Dudman*, 1 Stark. 1, it was held by Lord *Ellenborough*, that if a banker be under acceptances to an amount beyond the cash balance in his hands, every bill he holds of that customer's, *bona fide*, he is to be considered as holding for value; and it makes no difference, though he hold other collateral securities, more than sufficient to cover the excess of his acceptances. The same doctrine was affirmed by Lord *Eldon* in *Ex parte Bloxham*, 8 Ves. 531, as equally applicable to past and to future acceptances. The subsequent cases of *Heywood v. Watson*, 4 Bing. 496, and *Bramah v.*

Roberts, 1 Bing. N. C. 469, and Percival *v.* Frampton, 2 Crompt., Mees. & Rose. 180, are to the same effect. They directly establish that a *bona fide* holder taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions which our researches have enabled us to ascertain to have been made in the English Courts upon this subject.

In the American Courts, so far as we have been able to trace the decisions, the same doctrine seems generally, but not universally, to prevail. In *Brush v. Scribner*, 11 Conn. 388, the Supreme Court of Connecticut, after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a *bona fide* holder against all the antecedent parties to a negotiable note. There is no reason to doubt that the same rule has been adopted and constantly adhered to in Massachusetts: and certainly there is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial States, it may fairly be presumed that whatever constitutes a valid and valuable consideration in other cases of contract, to support titles of the most solemn nature, is held *a fortiori* to be sufficient in cases of negotiable instruments, as indispensable to the security of holders, and the facility and safety of their circulation. Be this as it may, we entertain no doubt that a *bona fide* holder, for a pre-existing debt of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities. We are all, therefore, of opinion, that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court.

CATRON, J., said: Upon the point of difference between the judges below, I concur, that the extinguishment of a debt, and the giving a *post* consideration, such as the record presents, will protect the purchaser and assignee of a negotiable note from the infirmity affecting the instrument before it was negotiated. But I am unwilling to sanction the introduction of a doctrine into the opinion of this Court, aside from the case made by the record, or

argued by the counsel, assuming to maintain that a negotiable note or bill, pledged as collateral security for a previous debt, is taken by the creditor in the due course of trade: and that he stands on the foot of him who purchases in the market for money, or takes the instrument in extinguishment of a previous debt. State courts of high authority on commercial questions have held otherwise; and that they will yield to a mere expression of opinion of this Court, or change their course of decision in conformity to the recent English cases referred to in the principal opinion, is improbable; whereas, if the question were permitted to rest until it fairly arose, the decision of it either way by this Court, probably would, and I think ought, to settle it. As such a result is not to be expected from the opinion in this cause, I am unwilling to embarrass myself with so much of it as treats of negotiable instruments taken as a pledge. I never heard this question spoken of as belonging to the case until the principal opinion was presented last evening: and therefore I am not prepared to give any opinion, even was it called for by the record.

The following opinion, delivered in 1851, in *Atkinson v. Brooks*, 26 Vt. 574, contains a summary of the decided cases at that time, and a statement of the several questions involved.

REDFIELD, C. J. This case, as the defendant's testimony tended to prove, and as the jury seem to have found, in giving a verdict for defendant, was a bill of exchange, drawn by one Asa Low, at Bradford, Vermont, upon the defendant, at Sherbrook, Canada East, payable to the order of the drawer, at the bank in Boston, Mass., three months from date, and being accepted and indorsed, was deposited with a firm of merchants in Boston to raise money for Low, and remit to him at Bradford. But they, before its maturity, passed it to one of their creditors as *security* for a note of some eleven hundred dollars, which they were owing them at the time, and which was overdue. The bill being dishonored, was duly protested, and is sued in the plaintiff's name for the benefit of the house to whom it was passed, as security for their note. The defendant is merely an accommodation acceptor.

The important question in the case is, whether the plaintiff's interest can be regarded as holders for value. No question was made but that they took the bill in good faith, and without knowledge even of the defendant being merely an accommodation acceptor, or of any confidence between the parties of whom they took the bill, and any prior party. The inquiry seems naturally to resolve itself into two leading questions:—

1. Did the plaintiff, in fact and upon principle, give value for the bill, and can he, upon this ground merely, be justly regarded as a *bona fide* holder for value? It seems now to be pretty generally conceded, that one who takes a note or bill indorsed while current, in payment and extinguishment of a pre-

existing debt, must be regarded as a holder for value. This is certainly the general course of decision upon the subject, with some exceptions to be sure, and we do not well see how it can fairly be argued that one who gives up a debt and accepts a note or bill for the same, either on time or at sight, can be said to give no consideration for the same. He certainly does forego the pursuit of his own debt, and thus certainly puts himself, for the time, in a different, and, in law, a worse situation. And this must be regarded as *prima facie* a foregoing of some advantage by the indorsee and also an accommodation to the indorser, who may fairly be presumed to prefer this mode of meeting his debt. The transaction, therefore, possesses both the cardinal ingredients which constitute the text-book definition of a valuable consideration; it is a detriment to the promisee, and an advantage to the promisor. And it is no satisfactory answer to the case, to say the party who takes such bill or note, which proves unproductive, is in the same condition he was before. This is by no means certain. He has for the time foregone the collection of his debt, and in such matters, time is the essence of the transaction. And the debtor thereby gains time, — it may be more or less, — but of necessity some time is thereby gained; and in such matters this is always accounted an advantage, and is often of the most vital consequence to the debtor. How then can it fairly be said that this mere suspension of the debt during the currency of the note or bill, is no consideration? It seems to me such reasoning upon other subjects — indeed upon any subject where one is not pressed to the wall by the necessities of his case — would almost be regarded as frivolous; surely it is scarcely specious.

But it has often been claimed that there is an essential difference in principle between taking a current note or bill in payment, and as security for a prior debt then due. The transactions are certainly different in form, at least. But it seems to me, the ordinary case of taking such a security as payment, or as collateral to the prior debt, is the same in principle. One whose debt is due, in the commercial world, must pay it instantly, or he becomes a bankrupt. If, instead of money, he gives a bill or note, either on time or at sight, whether this is in form, in payment, or collateral to his debt, he gains time, and saves the disgrace and ruin consequent upon stopping payment. And, in either case, there is an implied undertaking that he shall wait upon his debtor till the result of the new security can be known; and in both cases, when that proves unproductive, the creditor may pursue his original debt, or he may sue the prior parties on the new security, except his immediate indorser, and sue him upon the original debt; or he may sue him as indorser, and also all prior parties. In this State, and some other of the American States, where a note or bill, when taken as payment, *prima facie* extinguishes the debt, it is more common to sue the debtor as indorser. But according to the English law, and the general commercial law, taking a current note or bill for a prior debt only suspends the right of action till the dishonor of the new security. According to the general commercial usage, there is, then, no essential difference in principle, whether a current note or bill is taken in payment or as collateral security for a prior debt, provided the note is, in both cases, truly and unqualifiedly negotiated, so as to impose upon the holder the obligation to conform to the general rules of the law merchant in enforcing payment. If, indeed, the note or bill is not so negotiated as to make the holder a party to it, or so as to require of him to pursue the strict rules of mercantile

usage in making demand of payment, and giving notice of dishonor, so as to charge his indorser, with all the prior parties, upon the peril of making the note or bill his own in payment of his debt, then he could not be regarded probably as having so taken the paper in the due course of business *bona fide*, and for value, as to shut out equitable defences existing between the original parties. But, ordinarily, we suppose it fair to conclude that one who takes a note or bill negotiated to him while current, although merely as collateral to a prior debt, is expected to pursue the same course in enforcing payment, as if he paid money for the bill. And it is scarcely supposable that one so taking security for a debt, will not conduct differently on account of the security. It is of necessity he should, if he puts any confidence in its ultimate availability; and one would scarcely part with such security, unless he expected more or less indulgence on account of it. And when the prior debt is suffered to remain uncollected, it is, under the circumstances, fair to conclude such was the stipulation. And the case of one who takes a note or bill so negotiated, whether in *payment* or in *security* of a prior debt, implicitly stipulating to forego the collection until the maturity of the collateral paper, when such paper proves unproductive, is the same in *both alternatives*. In either case he may pursue his remedy upon the negotiable paper against all the prior parties, including his immediate indorser, or omitting him, he may pursue the other parties to the bill or note, and sue his original debt equally, whether he took the paper in payment or as collateral security of such debt, so that the difference between the two cases is merely formal. And if, in case of negotiating current paper as collateral security for a prior debt, the holder is not regarded as having taken it upon a valuable consideration, then the indorser may recall it at will. For if there is no such consideration as to make the contract binding, it is revocable at will.

And if not upon consideration as to one party, neither is it as to the other. And in such case the holder is merely the agent of the indorsee for purposes of collection, and, as such agent, subject to his control, and bound to surrender the security at will. This was the view taken in *De La Chaumette v. The Bank of England*, 9 Barn. & C. 208. But that case turned upon the peculiar construction given to the facts of the case. Such is certainly not the common case of taking negotiable paper as collateral security for a debt already due. The indorser, in such case, can no more recall or control the paper, than if he had received the money or goods in payment of the same. And when one takes a bill or note negotiated before maturity, in payment of money advanced or goods sold, such paper is, in fact, only collateral security for the money or the price of the goods, and suspends such debts only till the dishonor of the bill; and is in law precisely the same thing as if the lender of the money or the vendor of the goods took a note for the money or goods, and a bill or note negotiated as collateral to such note, with the agreement to wait till such collateral was paid or dishonored. In all these cases, it would never be claimed that the indorser of such bill or note could take it out of the hands of the indorsee at will. But this he clearly might do, if such indorsee had not taken it upon consideration. If, for instance, one holds a debt due six months hence, and his debtor, as a mere volunteer service, indorses a current note or bill as collateral security, the collateral being due in three months, it could not be made to appear that such transaction, before the indorsee had been at any pains in the matter, was a contract upon con-

sideration. The prior debt not being due, the creditor could forego nothing, and the debtor receive no advantage from the transaction. And the agreement to apply the collateral upon a debt not yet due — being without consideration — would, probably, in the first instance, be revocable at will, and so, also, as long as the parties remained in the same situation. It seems needless to spend more time to show that, upon principle and in fact, one who, having a debt due, accepts of his debtor a current note or bill indorsed to himself as collateral security for the debt, with the understanding that indulgence is to be shown on the prior debt, which in fact follows, does take such paper upon consideration, and gives value. Upon careful examination of this matter, it seems strange that such a question should ever have been raised; and it probably never would have been, but from the indefiniteness of the implied obligations growing out of such a transaction.

2. The more important question growing out of the case is, perhaps, what is the true commercial rule established upon this subject? And it is of vital importance in regard to commercial usages, that they should, as far as practicable, be uniform throughout the world. And such is necessarily the ultimate desideratum, and will inevitably be the final result. It is, therefore, always a question of time as to uniformity in such usages. The basis of such uniformity is convenience and justice combined; and until such rules become measurably settled by practice, they have to be treated as matters of fact, to be passed upon by juries; and when the rule acquires the quality of uniformity and the character of general acceptance, it is then regarded as matter of law. It is thus that most of the commercial law has, from time to time, grown up. In the case of *Foster v. Pearson*, 1 Crompt. M. & R. 849, Lord *Lyndhurst*, while Chief Baron of the Court of Exchequer, left it to the jury to determine, upon the evidence, as to general commercial usage in the city of London, whether the plaintiff had taken the bill in the due course of business, and the full Court held that the question was properly submitted to the jury. But in this case it seems to be recognized as settled law, that one who takes an indorsed note or bill still current as collateral security for a prior debt, is a *bona fide* holder for value. So, too, as early as 1814, in *Bosanquet v. Dudman*, 1 Stark. 1, Lord *Ellenborough* said, "that whenever the acceptances exceed the cash balance, the plaintiff held all the collateral bills for value;" and the Court of Exchequer, in *Percival v. Frampton*, 2 Crompt. M. & R. 180, decide the same point. *Parke, B.*, says: "If the note were given to the plaintiffs as a security for a previous debt, and they held it as such, they might be properly stated to be holders for valuable consideration." This is in 1835. And the same rule is certainly recognized in *Heywood v. Watson*, 4 Bing. 496. So also in *Bosanquet v. Forster*, 9 Car. & P. 659, and *Same v. Corser*, ib. 664. *Palmer v. Richard* is a full authority to show that it is not material whether the note or bill be deposited as security for an advance, or in payment, as some of the American cases seem to suppose. (1851), 1 Eng. Law & Eq. 529; s. c., 15 Jur. 51.

In *Smith v. Braine*, 3 Eng. Law & Eq. 379; s. c., 15 Jur. 41, the proper distinction between accommodation paper and paper fraudulently or illegally obtained or put in circulation is discussed, and placed upon the sensible and true ground no doubt, viz., that in the former case it is incumbent upon the maker or acceptor to show that the holder took it without consideration, the law mak-

ing the ordinary presumption in favor of the holder of accommodation paper, which is, in fact, made for the purpose of being put in circulation; and it being, therefore, fair to presume the holder took it for value, and *bona fide*. But in case of a note or bill, illegal in its inception, or fraudulently put in circulation, if these facts be *proved* in defence, it has sometimes been held that it imposes upon the holder the necessity of proving in answer that he gave value for the paper. 15 Jur. 287. So also in *Mills v. Barber*, 1 Mees. & W. 425, it was long ago declared by Lord *Abinger*, that the courts in Westminster Hall had, upon consultation, determined so to decide the law. The same distinction between accommodation paper and paper fraudulently put in circulation, obtains in many of the American States. But this distinction is not, perhaps, very important here, inasmuch as the defendant claims both want of consideration for his acceptance, and fraud in putting the paper in circulation. *Harvey v. Towers*, 4 Law & Eq. 531; s. c., 15 Jur. 544.

But that the English law is fully settled in favor of the indorsee of current negotiable paper, who takes it as collateral security for a prior debt, there can, I think, be no doubt, since the decision of *Poirier v. Morris*, 20 Law & Eq. 403; s. c., 22 Law Journal (N. S.), Q. B. 313; 2 El. & Bl. 89, May, 1853, long since the present action was pending. This was an action upon a foreign bill which was negotiated to plaintiffs as security for a previous debt, and at the time of receipt passed to the credit of the debtor. It being dishonored was protested, and therefore charged in account against the debtor to balance the former credit, with the addition of expenses. This would seem to be the usual course of doing business in Europe, and probably obtained to a considerable extent in the American cities, — bills and notes being credited on receipt and charged upon dishonor, and all the collaterals being thus holden for the ultimate balance. This case was decided upon the general ground of the plaintiff's title at the time he took the bill as security for the balance of his account. Lord *Campbell*, C. J., in giving judgment, says: "There is nothing to make a difference between this and a common case where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration." *Crompton*, J., says: "Whether the bill was a collateral security, or whether it had the effect of suspending the payment of the antecedent debt, is quite immaterial. The plaintiffs had a perfect right to keep it." We think, therefore, it must be regarded as settled law in England at the present day, that such a bill or note taken as collateral security for a prior debt, is taken in the due course of business and for value. Such being the settled rule of the English law, which is confessedly of great and paramount force upon a question of this kind, it is certainly desirable that, in regard to commercial law of such extensive application in the every-day transactions of business, the law of the American States should also be uniform, and, as far as reasonable and practicable, correspond with the acknowledged rule in other States and countries. The case of *Swift v. Tyson*, 16 Pet. 1, upon the most elaborate examination and debate, adopts the English rule, and upon general grounds of settled commercial law. The decisions of the national tribunal are not indeed of any binding authority upon the general rules of the law merchant in a State Court, further than they commend themselves to our sense of reason and justice. But such a decision as that of *Swift v. Tyson*, upon such a subject, could scarcely fail to be regarded as of very considerable force, and,

if sound in principle, would, almost of necessity, ultimately form the basis of that uniformity of commercial law in these States which, sooner or later, must, from its very great convenience, ultimately prevail. If not sound in principle, it would with difficulty be maintained even by that Court.

Aside from our former remarks, going, as we think, to show the soundness of the rule laid down in *Swift v. Tyson*, the course of decision in the several States since the date of that decision, show a general disposition to adopt it. Indeed, in many of the States, a similar rule prevailed before that. In Pennsylvania, *Petrie v. Clark*, 11 Serg. & R. 377 (1824), recognizes fully the sufficiency of the consideration for the indorsement of a note or bill where it is taken in payment of a prior debt, and even as *collateral security*, if there is any agreement to wait on the prior debt, or any other damage is sustained in consequence, or the indorsee waives or temporarily foregoes any of his other rights. This ground, assumed by *Gibson, J.*, at that early day, is certainly a very near approach to the rule of *Swift v. Tyson*, and the present English rule upon the subject. The only difference seems to be in not holding that one who takes such paper as collateral security, is presumed to conduct differently on account of it. *Walker v. Geisse*, 4 Wharton, 252, maintains very much the same ground.

In Maine, *Holmes v. Smith*, 16 Maine, 177, decides that, if such paper be taken in payment of a pre-existing debt, it defeats all equitable defences between the original parties. So also in New Hampshire, *Williams v. Little*, 11 N. Hamp. 66. The decision in this case, that such paper being indorsed as collateral security *for a loan made at the time*, is not held for value, is certainly not justified by the decisions in any other State, so far as I can find. The New York courts, who have resisted this rule with the most unflinching pertinacity, do not so hold, but the contrary. *Williams v. Smith*, 2 Hill, 301; *Watson v. Cabot Bank*, 5 Sandford, 423; *Carlisle v. Wishart*, 11 Ohio, 172, adopts the view of *Holmes v. Smith*. *Blanchard v. Stevens*, 3 Cush. 162, holds the same. So also *Norton v. Waite*, 20 Maine, 175. So too, *Bostwick v. Dodge*, 1 Douglass (Michigan), 413. *Bush v. Peckard*, 3 Harrington (Delaware), 385, goes to the same extent. So also the case of *Brush v. Scribner*, 11 Conn. 388. In none of these cases except *Williams v. Little*, did the question arise, whether taking a note or bill indorsed as collateral security for a prior debt, is the same as taking it in payment. There is, therefore, every reason to suppose that no such distinction will be attempted in any of those States, unless it be the latter State. The case of *Barney v. Earle*, 13 Alabama, 106, is to the same extent. In *Reddick v. Jones*, 6 Iredell (North Carolina), 107, all distinction between taking negotiable paper in payment and as collateral security is repudiated, and both held to be valuable and sufficient considerations. In this case the paper was taken in payment, to be sure. So also in Georgia, *Gibson v. Connor*, 3 Kelly, 47, expressly decides that taking such paper as collateral security for a prior debt, is sufficient to shut out equitable defences. So also in Indiana, *Valette v. Mason*, 1 Smith, 89. And the same is held in New Jersey, *Allaire v. Hartshorn*, 1 Zabriskie, 665; and in *Chicopee Bank v. Chapin*, 8 Met. 40, the same rule is recognized, although there the debt was created at the time the paper was negotiated as collateral security. Thus, we think, most of the States may be regarded as virtually having adopted the rule laid down in *Swift v. Tyson*. Chancellor *Kent*, too, 3 Com. 96 and note, adopts the same rule, "as the plainer and better doctrine;" and

Allen v. King, 4 McLean, C. C. 128. It is to be borne in mind that, upon the other side, New York contends strenuously that such paper, taken either in payment or as security for a prior debt, is not held upon any sufficient consideration to shut out equitable defences. I think the New York courts are consistent and sound, in denying all distinction between taking such paper in payment, and as security for a prior debt. There obviously is no difference in regard to the consideration. But, even in New York, they have felt compelled to decide that, if such paper^{*} is taken in payment of a prior debt, being indorsed *without recourse*, the holder acquires perfect title, and may shut out equitable defences between the original parties. *Bank of St. Albans v. Gilliland*, 23 Wend. 311. And if one gives his own note for such paper, it makes him a holder for value even in New York. 4 Barb. S. C. 304. These two cases seem very much like an abandonment of the principle of the rule even there. In Kentucky, too, a similar rule to that in New York has prevailed. *Breckinridge v. Moore*, 3 B. Monroe, 629. It is claimed, too, that Virginia adopts the same ground in *Prentice v. Zane*, 2 Grattan, 262; but that case does not decide the point, a new trial being awarded for defect in the special verdict. Similar decisions have been made in Tennessee. In *Wormley v. Lowry*, 1 Humphrey, 468, *Green, J.*, says: "Where one receives a note for a pre-existing debt, he parts with nothing. He is in the same situation after a successful defence by the maker, that he was before he took the note." This is certainly a remarkable instance of the *non sequitur*, to have imposed any delusion upon the mind of an experienced judge. He is in the same situation. But how can that be made to appear? He has let the collection of his debt or its security surcease for the time, and time is often fatal in such matters, and has incurred the expense and vexation of litigation; and is still in the same situation. Surely he is in one respect; his debt is still unpaid; and in another also, which is somewhat important, he is again out of court. And it seems to me that all refinements upon such absurd premises are always liable to involve one in similar contradictions and incomprehensible conclusions. I certainly feel no disposition to deal lightly or in a vainglorious spirit, with the general argument upon which this view is attempted to be maintained. It will be found ably stated by *Walworth*, Chancellor, in *Stalker v. McDonald*, 6 Hill, 93.¹

This embraces most of the decisions upon the subject both in this country and in England. And we could scarcely question that the decided and increasing preponderance is in favor of the plaintiff's claim to hold the bill free from all equities of the acceptor; and, coinciding as it does with our views of the reason and justice of the case, we could not hesitate to adopt it. We might probably have decided the case upon the Massachusetts law, as the contract seems, upon its face, to have been made with reference to that place. But as this question was not made in the Court below, it does not properly arise here, probably. And we have chosen to put the case upon the general rule of the law merchant, the ordinary presumption being that the law of any particular place, in regard to commercial contracts, conforms to the general law, unless the contrary be shown. The party who claims the benefit of the law of a particular place, on the ground of its being different from the general rule of law on that subject, must prove the law of that place to be different, as he would prove any other fact in the case. This leaves that question open.

¹ *Ante*, 169.

We do not understand the plaintiff to claim seriously that he can recover the balance of this bill above the amount of the note which was due at the time of the negotiation of the bill, and as security for which it was negotiated. We do not see how he could claim that. The valuable consideration must be limited to the amount of the prior debt, due at the time of the negotiation of the bill.

1. A note or bill negotiated in security for a debt not yet due, is not upon sufficient consideration ordinarily, unless the creditor wait in faith of the collateral after his debt becomes due.

2. If the debtor is notoriously insolvent before the note or bill is negotiated as collateral security, it is said the creditor can only stand upon the rights of his debtor.

3. If a note or bill is taken merely to collect for the debtor, to apply when collected, the creditor not becoming a party by indorsement so as to be bound to pursue the rules of the law merchant in making demand of payment and giving notice back, the holder is merely the agent of the owner. *De La Chaumette v. Bank of England, supra.* *Allen v. King*, 4 McLean, C. C. 128.

4. So too probably, if it were shown positively that the holder gave no credit to the indorsed bill, and did, in no sense, conduct differently on that account, he could not be regarded as a holder for value.

These four exceptions are probably based upon good sense, and may be found sustained by authority, but we have no occasion to say more in regard to them here. This case stands upon the general broad ground of paper taken in the due course of business as collateral security for a debt due, and, *prima facie*, the holder is under such circumstances to be regarded as holding the paper for a valuable consideration, and so entitled to recover against an accommodation acceptor.

Judgment reversed.

The following note, prepared for the "American Law Register," in 1861, 1862, Vol. I. N. S. 35, by one of its present editors is now adopted as the best view we could give of the law upon the questions discussed up to that date. *Le Breton v. Peirce*, 2 Allen, 8; s. c., 9 Am. Law Reg.

One of the questions involved in this case is of great interest with business men; and it seems almost incomprehensible how there should have been so much conflict in the decisions of the courts in this country in regard to it. It probably may have arisen from not clearly discriminating the precise state of facts upon which the different views found themselves. This will readily be perceived by carefully examining the opinions of the different judges. But we think something of this embarrassment may be got rid of by careful classification.

I. Where the negotiation of the note or bill, as between debtor and creditor, is understood to operate either as conditional payment, or to create an expectation between the parties that the collection of the principal debt shall be delayed until the time of payment of the collateral security, there can be no question that, upon principle and authority, the creditor must be said to take the paper upon full consideration, and in the due course of business. The conflict in the cases seems to arise upon the question, what is *implied* by accepting a note or bill, on time, for a pre-existing debt then due?

1. This will depend, to some extent, upon commercial usage, and the ordinary course of doing business, and the natural implications, from the mere act of accepting the note or bill, and is, therefore, matter of fact, in part, at least. The implication, as matter of fact, is different in some respects, whether the new note or bill is for the precise amount of the existing debt, as in *Michigan State Bank v. The Estate of Leavenworth*, 28 Vt. 209; or for a different sum, either more or less, and especially when it is for a less sum. Where the new security is for the precise sum of the debt, and is payable on time, there is, in fact, a very strong implication that the creditor will wait until the maturity of the new security. And in that view the cases all agree that the new security is taken for value, and that all equities in favor of other parties will be excluded. And a similar implication results where the new security is for a larger sum than the existing debt, as in *Atkinson v. Brooks*, 26 Vt. 569, *supra*.

2. But where the security is of a different character from the original debt, as where the creditor takes a mortgage from the debtor for the payment of the sum due in six months, it is not understood there is any implication of a contract to delay the collection of the debt of other parties. *United States v. Hodge*, 6 How. U. S. 279.

3. And where the new security is not given in lieu, or on account of the existing debt, but as a mere pledge, the title of the new security remaining in the debtor, and not passing to the creditor, thus making the creditor the mere trustee or agent of the debtor for the collection of the new security, to be applied when collected, upon the existing debt, between them, as was held in the case of *Austin v. Curtis*, 31 Vt. 64; the cases all agree that there is no implied undertaking not to collect the existing debt in the mean time.

The following cases may therefore be regarded free of doubt, both upon principle and authority: —

1. If the collateral is given in security at the time the debt is created, and as an inducement for the credit, and is a negotiable instrument and still current, and is, in fact, negotiated to the creditor so as to make him a party to the paper and impose upon him the duty of demand and notice, according to strict commercial usage, the cases all agree, so far as they have comprehended the questions involved, that all equities of third parties are excluded. *Chicopee Bank v. Chapin*, 8 Met. 10; *Griswold v. Davis*, 31 Vt. 390; *Palmer v. Richards*, 1 Eng. L. & Eq. 529. The declaration in *Williams v. Little*, 11 N. Hamp. 66, and many other cases to the contrary, is certainly not maintainable upon any fair view of the question in that precise form of it.

2. If the collateral is not so negotiated as to make the creditor a party to the paper, and thus impose upon him the duty of making demand and giving notice, but making the creditor the mere agent of the debtor for the collection of the new bill or note, there is no ground of excluding equities in other parties, unless the creditor negotiates the security thus left in his hand to some third party for value and while current. *Palmer v. Richards*, 1 Eng. L. & Eq. 529; *Atkinson v. Brooks*, 26 Vt. 569; *De La Chaumette v. Bank of England*, 9 B. & C. 208; *Allen v. King*, 4 McLean, 128.

In such case, the debtor, it would seem, may recall his collaterals, as the creditor, being his agent, is under his control. But this is certainly not the ordinary case of collateral security.

3. Where there is either an express contract with the creditor, that he shall, in consideration of the indorsement of the new bill or note, as collateral, delay the collection of the existing debt until the maturity of the new security; or where such an understanding is reasonably to be presumed from the facts and circumstances attending the transaction, and the delay is thereby obtained, there is no ground of question, since they stand upon the same footing in point of principle, as if an advance were made upon the credit of the new security. *Okie v. Spencer*, 2 Whart. 253; s. c., 2 Am. Lead. Cas. 232, and numerous cases there cited. These cases are so obvious upon principle, to the mind of all lawyers, that it would be a useless labor to attempt to render them more perspicuous. What is self-evident thereby becomes incapable of simplification, since there is nothing more obvious by which it can be illustrated.

II. In coming to the inquiry, what is the precise legal implication, from the mere fact of receiving a negotiable security without surrendering any of the former securities for an existing debt, we encounter more perplexity.

1. This will depend, undoubtedly, to a great extent upon the course of doing business, and the commercial usages of the place. From all we can learn of this commercial usage in England, judging both from the reported cases and the elementary works, we infer that each new security is there credited as so much cash at the time it is received, and is charged to the debtor, in case of dishonor, with the addition of expenses attending the protest. *Poirier v. Morris*, 20 Eng. L. & Eq. 103; *Bosanquet v. Dudman*, 1 Stark. 1. In this last case Lord *Ellenborough* said, "that whenever the acceptances exceed the cash balance, the plaintiff holds all the collateral bills for value." *Ex parte Pease*, 19 Vesey, 25. In this mode of transacting business, the new notes or bills, from time to time remitted to the creditor by his debtor, are upon receipt, passed to his credit, and thus virtually discounted. This, we apprehend, is the usual course of doing business in this country, where one has an open account with banks or bankers, and not unfrequently with brokers. How far it obtains with merchants it is not very certain, depending upon the nature and the amount of the dealings. But whenever the business is conducted in this form, there would be no difference as to the right of the creditor to hold the collaterals, whether they were taken in payment, or as security, or whether any advances in money were made at the precise time the collaterals were negotiated, since passing them to the credit of the debtor as so much money, is strictly advancing the money upon them. This, we apprehend, is the true explanation of the reason why we find so little said, in the English cases, or treatises on bills and notes in regard to these distinctions, which occupy so much space in our own reports. The case of the *Bank of the Metropolis v. The New England Bank*, 1 How. U. S. 234, is precisely of this character, and the creditor was allowed to hold the collaterals free from all equities.

2. But in whatever mode the business is transacted, if we look carefully into the true principles involved, we shall come much to the same result. It has always seemed to us that most of the controversy upon this subject has grown out of the different sense in which the terms used are understood. If the term "collateral" is understood to import that the bills thus held are not taken on account of the existing debt, but only to be held until due, and if paid, the amount to be applied, and in the mean time the creditor assumes no respon-

sibility in regard to them, except as the mere agent of the debtor for collection, there could be no ground of claim that any property passed, or that existing equities in former parties were extinguished. The English cases in bankruptcy show very clearly that, in such cases, the title in the bills does not pass to the assignee, but may be retained by the correspondent. *Ex parte Pease*, 19 Vesey, 25; *De la Chamette v. The Bank of England*, *supra*.

3. But we apprehend this is not the ordinary acceptance of the term *collateral*, or collateral security; for it is no *security* at all. The etymology of collateral security indicates that it is something running along with, and, as it were, parallel to, something else, of a similar character. It is collateral to the original indebtedness. It is, of course, a security, but it need not be in the precise form of the original. A bond may be secured by a collateral indebtedness in the form of a bill or note, and *vice versa*, and the collateral will always include other parties. But as far as the debtor is concerned, they are holden for the payment of the debt, and the creditor is equally at liberty to pursue all in all legal modes, unless there is some express or implied restriction upon the title of the collaterals.

In this sense the title passes, by the negotiation of a bill or note, as collateral, the same as if the money were advanced. The only difference is, that this form is dispensed with, and the creditor retains his original security. Ordinarily, the collateral may not bind the same parties as the original security, or not all of them. In such cases the creditor will wish to retain the original, so as to lose none of his security. All that the word collateral imports is, that there is a prior or existing debt, and the collateral depends upon that, stands or falls with it, so far as the creditor is concerned.

4. But if the party takes the indorsement of a bill of lading, or of a bill of exchange, or note, he acquires no different rights as to the parties to these new instruments, whether he takes them in payment, or as collateral to an existing debt. In either case he becomes a party to the transaction or contract to the fullest extent, and, in the case of negotiable instruments is bound to pursue the law merchant in making demand and giving notice, at the peril of making them his own, in actual exoneration of the party negotiating them.

5. In such cases it can be of little importance whether the original debt is treated as extinguished or not, since, if the debtor negotiate the note or bill by his own indorsement, which is the usual course, he is bound by such indorsement, and the double bond is of no essential importance. And if the creditor do not take steps to charge his debtor as indorser, he makes the collateral his own in payment of his debt, and the result is the same, whether he is bound doubly or singly, since the release extinguishes both or one, as the case may be.

6. The mere giving of a negotiable note or bill for an existing debt, is only conditional payment in any case, by the general law merchant, unless there is an express agreement that it shall extinguish the original debt. Upon the dishonor of the new note or bill the creditor may sue the original debt, or the indorser of the new bill or note, at his election, so that the note or bill is but a collateral in any case, unless there is some special contract, or some special usage, as in the New England States, that the acceptance of the new note or bill shall, *prima facie*, extinguish the debt. These propositions are familiar, and scarcely require specific authority for their support. The cases are carefully collated, in 2 Am. Lead. Cas. 241-273.

III. Most of the conflicts in the American cases, and in all the English cases, will be readily reconciled by reference to the foregoing distinctions. And those anomalous cases in the American States, which will not come into these distinctions harmoniously, have been decided without properly apprehending the true principles involved, and must be left in their appropriate solitude until they are either abandoned, or else the course of business, or the principles of natural justice become so far modified that they can be adopted by others.

1. In the case of *Poirier v. Morris*, *supra*, *Crompton, J.*, said: "Whether the bill was a collateral security, or whether it had the effect of suspending the payment of the antecedent debt, is quite immaterial." And Lord *Campbell* said: "There is nothing to make a difference between this and the common case, where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration." And in *Percival v. Frampton*, 2 Crompt. M. & R. 180, *Parke, B.*, said: "If the note were given to the plaintiffs as security for a previous debt, and they held it as such, they might be properly stated to be holders for valuable consideration." The same rule is recognized in numerous other English cases. *Heywood v. Watson*, 4 Bing. 496; *Bosanquet v. Forster*, 9 Car. & P. 659; *Same v. Corser*, *ib.* 664; 2 Am. Lead. Cas. 250, 251. The rule is thus stated in the work last quoted, which has almost become a book of authority in the American courts. "The result of the English cases would seem to be, that accepting a note or bill payable at a future day, on account of a pre-existing debt, will suspend the debt until the note reaches maturity. Byles, Bills, 6th ed. 304." "The law is clear," said Lord *Kenyon*, in *Steadman v. Gooch*, 1 Esp. 4, "that if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action for his original debt until such note or bill becomes payable and default is made in the payment." And the cases all agree that no recovery can be had in any case, upon the original debt, where the collateral, given in security, was indorsed while current, and is still outstanding. *Price v. Price*, 16 Mees. & W. 232, 243. And in every case where the party accepts a collateral as security for a previous debt then due, there is no implied obligation not to negotiate the collateral before maturity. In nine cases out of ten that is done among business men immediately, for the purpose of raising the money which should have been paid when the debt matured; so that the collateral is always received for the ease of the debtor, and it is not ordinarily received as a mere pledge, so that negotiating it would be a breach of good faith. On the contrary, the security being negotiable, passes as money, and operates as payment conditionally, and it is expected to be passed into the market at once.

All that is implied, then, by its being collateral is, that there is no agreement or implication that the original debt is extinguished. The creditor intends to hold on to his original debt and all other securities. The new security, then, is collateral to the previous debt: but the new security, as between the parties to it and the creditor, is not affected by its being collateral to the previous debt, any differently from what it would be if it were received in extinguishment of it. It is negotiated in the fullest manner, and subject to the law merchant, and with no restrictions upon its further negotiation. We think, therefore, that the English courts have taken the true view in saying that such paper passes for value, and in the ordinary course of business, and excludes all existing equi-

ties, without regard to the understanding, agreement, or implication, as matter of fact, that the creditor should delay the enforcement of the existing debt until the maturity of the new security. And that they are also right in saying that it makes no difference in principle or legal effect, whether the existing debt is extinguished or not, or whether the original evidence of debt, or the existing securities are surrendered or not. *Kearslake v. Morgan*, 5 T. R. 514; *Baker v. Walker*, 14 Mees. & W. 465; *Belshaw v. Bush*, 11 C. B. 191, 200; *Ford v. Beech*, 11 Q. B. 852, 873. These transactions, indorsing negotiable securities on account of previous debts, without special agreement as to the effect, are there treated as "necessary exceptions to the general rules of law, in favor of the law merchant." This rule has been adopted in this country by the national tribunal of last resort. *Swift v. Tyson*, 16 Pet. 1. This decision was made upon the maturest consideration, and has prevailed in most of the States, and is expressly extended to collaterals. *Bank of the Metropolis v. New England Bank*, *supra*. *Petrie v. Clark*, 11 Serg. & R. 377, as early as 1824, adopts almost precisely the same view, except that it is not assumed as matter of necessary implication that one who accepts security for a debt will, to some extent, change his conduct in consequence. See also *Walker v. Geisse*, 1 Whart. 252. In *Holmes v. Smyth*, 16 Maine, 177, it is decided that where negotiable paper is taken in payment of a previous debt, it will exclude all equities in other parties. To the same extent is *Williams v. Little*, *supra*. The same view is adopted in *Carlisle v. Wishart*, 11 Ohio, 172; *Norton v. Waite*, 20 Maine, 175; *Bostwick v. Dodge*, 1 Dong. Mich. 413; *Bush v. Peckard*, 3 Harrington, 385; *Brush v. Scribner*, 11 Conn. 388; *Barney v. Earle*, 13 Alabama, 106. In these cases, except *Williams v. Little*, the question did not arise in regard to negotiable paper being taken as collateral security. But in many of the States, as well as in *Swift v. Tyson*, and the *Bank of the Metropolis v. The New England Bank*, *supra*, all such distinction is disclaimed, and held to have no existence in principle. *Reddick v. Jones*, 6 Fredell, 107; *Gibson v. Conner*, 3 Kelley, 47; *Valette v. Mason*, 1 Smith, 89 (Indiana); *Allaire v. Hartshorn*, 1 Zabrickie, 665; *Blanchard v. Stevens*, 3 Cush. 162. The fallacy of supposing that the creditor is in the same condition after having failed to enforce the collection of his collaterals, as if he had not received them, is here placed in the clearest light by *Dowry, J.*: "If the party had not received the note as collateral security, he might have pursued other remedies to enforce the security or payment of his debt. He might have obtained other securities or, perhaps, payment in money. It is a fallacy to say that if the plaintiff is defeated in their attempt to enforce the payment of these notes they are in as good a situation as they would have been if the notes had not been transferred to them. That fact is assumed, not proved, and from the very nature of the case is matter of entire uncertainty. The convenience and safety of those dealing in negotiable paper seem to require and justify the rule that when a person takes a negotiable note not overdue or apparently dishonored, and without notice, actual or constructive, of want of consideration or other defence thereto, whether in payment of a precedent debt or as collateral security for a debt, the holder would have the legal right to enforce the same against the parties thereto, notwithstanding such defence might not have been effectual as between the original parties." And the Supreme Court of Rhode Island, after very careful and

thorough examination of the cases, have recently come to the same conclusion. *Bank of the Republic v. Carrington*, 5 R. I. 515. See also *Atkinson v. Brooks*, 26 Vt. 569, *supra*. It scarcely seems necessary to enumerate the cases in New York and some other States which have followed their lead, where it has been held that paper negotiated as collateral on account of a previous debt is not taken for value, and is subject to all equities. We think it most unquestionable that the New York courts are right in saying there is no distinction in principle between taking such paper in payment, and as collateral to a pre-existing debt. But the truth undoubtedly is, that either forms a good consideration, and the title of the creditor depends upon the *character* of the paper, and is an exception to all rules attaching to the delivery of *other property* as security for a debt.

The main point of the decision in the very case before us, that the trust which unquestionably attached to the property which formed the consideration of the bills could not attach to the bills after they had been *bona fide* negotiated in the market, although merely between debtor and creditor, and no new advance made specifically on such account, goes exclusively upon the peculiar quality and character of negotiable paper as to the transmission of its title. It passes in the market as money. No man is bound to make any inquiry into the title of the holder. And even carelessness, short of bad faith, will not defeat one's title to such paper, taken for value. *Goodman v. Harvey*, 4 Adol. & Ellis, 870, overruling *Gill v. Cubitt*, 3 Barn. & C. 466. See *Goodman v. Simonds*, *post*. And whether one advances money and then takes the money in payment of his debt, or takes the note or bill on account of the debt or as collateral security is not material, either in fact or in law. And to be consistent, we must either adopt the New York rule that in both cases there is no value given for the new note or bill, or else insist that value is given in both cases.

It is impossible, as it seems to us, to successfully contend for the contrary, unless where the previous debt is not due, or the new security is such that no trust is reposed in it; and these are exceptional cases. In every other case, the creditor *will* conduct differently on account of the new security, and *will* delay the collection of the previous debt until the result of the new security is determined. And then it is impossible to restore the creditor to his former position, since time is a very important matter in commercial transactions. We trust that, before many years, all our American courts will adopt the sensible views of the English courts upon this question, and not expend so much strength hereafter in determining the precise difference between receiving a note or bill "on account of," "in payment of," "as collateral to," and "as security for," an existing debt, since no one whose perceptions were not rendered very acute by the study of refinements and hair-breadth distinctions, would ever dream that there could be any essential difference in the rights of the creditor to have the full benefits of the new securities, and of "all the collaterals," in the language of Lord *Ellenborough* in *Bosanquet v. Dudman*, *supra*, until he obtained full satisfaction of his debt.

Since the preparation of the foregoing note for the Law Register, in 1861. the only important English case bearing directly upon the question mainly involved, is *Peacock v. Purcell*, 10 Jur. N. S. 178; S. C. 14 C. B. N. S. 728. It is here decided that where the defendant, being indebted to the plaintiff, indorsed to him a bill of exchange of which he was indorsee, as collateral security

for the debt, and the plaintiff failed to present it when due, or to give the defendant notice of its dishonor when presented, he could not recover, either upon the bill or the original debt. This seems to confirm one important contention in the preceding note and opinion; viz., that although the negotiable securities are, in terms, indorsed as collateral to an existing debt, the creditor will nevertheless become a party to the securities indorsed, with all the rights and duties of any other *bona fide* holder, which will of necessity cut off equitable defences. It seems to have been considered in some of the American cases that indorsing and passing negotiable paper as collateral security for a prior debt, does not give the creditor the rights, or impose upon him the duties, of a *bona fide* holder for value. But the case last cited is very explicit upon that point.

The facts of this case were that the defendant was indebted to the plaintiff in a larger sum than the amount of the bill, and first offered the bill in part-payment of the debt, and the balance in cash. The plaintiff declined to accept the bill in part-payment, and the defendant then consented to it being retained as collateral security for an amount of the debt equal to the bill, paying money for the balance. The judges were very clear and explicit upon the point of the creditor having become a party to the bill, with all the *rights* and *duties* pertaining to that relation. *Byles, J.*, said: "That as depositors of the bill, as they had the *rights* [one of which must be to exclude equitable defences], so they had the *duties* of holders." The Court do not seem here to consider that the legal rights of the creditor, as indorsee, would be materially affected by the precise form of the conditions upon which he accepted the paper, provided he took it in the ordinary course of business, and so as to become a legal and substantial party to the instrument. *Willes, J.*, said: "It may be taken for and on an account [of the debt] but with an understanding that the party receiving it is to have the option of suing for the debt before the maturity of the bill." The forms of expression most in use in the English courts, to express the idea of accepting negotiable paper on account of a prior debt are, "for and on account of;" "in payment of;" "instead of payment;" and as "collateral security for" the debt. And if we assume that the new paper is so received by the creditor, as that he becomes a valid party to it, it does not seem important either to his rights or interests, in which of the preceding forms he receives it. If received in payment of the debt, the debt is not thereby extinguished, unless there is some special agreement to that effect, as it will be where money or other property is given in payment of a debt. In the latter case the debt is gone, and cannot be revived unless the property is wholly worthless, and there was fraud. But in the case of accepting negotiable paper in payment of a debt, the only effect is to suspend the debt until the maturity of the paper. If the latter is then paid, it operates as absolute payment of the debt; if not paid, the debt remains as before, and the creditor may sue upon it, or upon the new security, or upon both, until he obtains satisfaction.

If the new paper is accepted as collateral security, there is no certain implication that the right of action upon the prior debt is suspended. It may be, or it may not. If there is a clear implication, as there will be in most cases, from the fact that the new security is either of the same or greater amount, or if there is an express agreement to that effect, or circumstances from which a jury may infer one, then there is no substantial difference between the creditor accepting nego-

liable paper in payment, or as collateral security for a prior debt. In both cases, the cause of action is suspended until the maturity of the new paper; in both, if paid at maturity, it absolutely extinguishes the debt; if not so paid, in either case, the creditor may sue upon the debt, or upon the new securities, or upon both, and in both cases, if the creditor do not pursue the rules of the law merchant with the new securities, he loses all remedy. In the case of *Peacock v. Purcell*, *supra*, *Erle*, C. J., said: "It clearly would be payment if, at maturity, the money were obtained for the bill." And the learned judge further argued, that the creditor having so conducted as to defeat all remedy upon the bill, he makes it his own in payment of the debt, and continued: "The security is marred by the plaintiff's own laches." "The legal effect," says the learned judge, "of taking a bill as collateral security, is that if, when the bill arrives at maturity, the holder is guilty of laches, and omits duly to present it and to give notice of its dishonor, if not paid the bill becomes money in his hands, as between him and the person from whom he received it." This last case affords, as we understand it, full confirmation of most of the propositions attempted to be maintained in the preceding note and opinion; viz., that all which is required, when current negotiable paper is indorsed on account of an existing debt, in order to exclude equitable defences is, that the creditor should so receive the new paper as to assume the position of a *bona fide* party to it.

It does not seem indispensable that there shall be any contract, either express or implied, to suspend the remedy upon the debt, in order to give the creditor the rights of a *bona fide* holder of the new paper, although that is a decisive circumstance in favor of the creditor being a *bona fide* holder when it exists, as it more commonly does, in all cases where new paper is accepted "instead of payment" of an existing debt. But where there is no evidence of such an understanding, and even when there is an express reservation on the part of the creditor of the right to pursue his remedy upon the debt, as will be necessary, in order to avoid impairing the claim against guarantors and sureties; even in such cases the rights of the creditor to be regarded as a *bona fide* holder, are most unquestionable in every instance where he assumes the responsibility of a party to the paper. That, of itself, is consideration sufficient to give him all the rights of a *bona fide* purchaser, to the extent of his interest; that is, until his debt is paid. This, we think, must now be regarded as the unquestionable state of the English law, since the decision of *Peacock v. Purcell*, *supra*, and the American law, since the decision of *Swift v. Tyson*, is fast approaching the same quiet and rational line of demarcation and rest.

It is clear, of course, that if the new paper received "instead of payment" of a prior debt is not negotiable, in form, or not in fact negotiated; *Whistler v. Foster*, 14 Com. B. N. S. 248; *Boody v. Bartlett*, 42 N. Hamp. 558; *Franklin v. Two-good*, 18 Iowa, 515; or if the creditor accepts the new paper merely for collection and "to be applied when collected," and not assuming the responsibility of a party; in either of the preceding cases he cannot claim the rights of a party so as to exclude equitable defences. See the learned opinion of *Bosworth*, C. J., in *Hoffman v. Miller*, 1 Am. Law Reg. N. S. 676, 681, and cases cited; *Warner v. Lee*, 6 N. Y. (2 Seld.) 144; *Scott v. Ocean Bank*, 23 N. Y. 289; s. c., 5 Bosw. 192.

It could serve no useful purpose to discuss the numerous recent decisions in the American States upon this point. There will be found among them all a constant

tendency towards the line indicated by the English decisions, and by Swift v. Tyson, in our own national court of last resort; whose authority may well be regarded as of paramount weight in regard to questions of general commercial law. That rule is fully recognized in Massachusetts. *Stoddard v. Kimball*, 6 Cush. 469; *Ives v. Farmers' Bank*, 2 Allen, 236; *Fisher v. Fisher*, 98 Mass. 303. So also in Connecticut. *Bridgeport City Bank v. Welch*, 29 Conn. 475; *Osgood v. Thompson Bank*, 30 Conn. 27. Rhode Island seems to have adopted much the same view. *Cobb v. Doyle*, 7 R. I. 550. So also in California. *Naglee v. Parrott*, 14 Calif. 450; *Robinson v. Smith*, *ib.* 91. New Hampshire seems still tenacious of maintaining some distinction between the rights of the creditor, when he accepts current negotiable paper in payment of, and when he receives it merely as collateral security for a prior debt. *Fletcher v. Chase*, 16 N. Hamp. 38; *Rice v. Riatt*, 17 *id.* 116. And Maine may be reckoned in the same category. *Nutter v. Stover*, 48 Me. 163. And in Vermont the law upon this question has certainly been very considerably agitated; and, as is not uncommon in such cases, is not yet very clearly settled. *Atkinson v. Brooks*, *supra*, was followed in *Michigan Bank v. Leavenworth*, 28 Vt. 209, without any division of the Court; while in *Austin v. Curtis*, 31 Vt. 64, one of the same judges, who had silently concurred in the two former decisions, delivered a labored and learned opinion, to show that accepting negotiable paper "instead of payment" of a debt falling due, if called "collateral security," does not raise any implication of the suspension of the remedy. The majority of the Court, as then constituted, concurred in this view. This is by no means fatal to the ground maintained in the former cases of *Atkinson v. Brooks*, &c., but removes one ground of argument upon which they rest. Since that, it has been there held, that where one gives his own note for negotiable paper, he is entitled to all the rights of a *bona fide* holder for value, and equitable defences are excluded. *Adams v. Soule*, 33 Vt. 538; *s. r.*, *Meekles v. Colvin*, 4 Beav. 304. This must be regarded as one of the most suspicious modes of shutting out equitable defences; far more so than where the paper passes, in the ordinary course of business, "instead of payment" of an existing debt, although called "collateral security."

There are some other States where the courts still seem to cling to the fallacy of attempting to maintain an equitable distinction between passing negotiable paper in payment of or only as collateral security for an existing debt. *Ryan v. Chew*, 13 Iowa, 589. And there are others where this distinction is not apparently adhered to. *Stevens v. Campbell*, 13 Wis. 375; *Outhwaite v. Porter*, 13 Mich. 533; *Manning v. McClure*, 36 Ill. 490; *Stevens v. Heyland*, 11 Minn. 198; *Citizens' Bank v. Payne*, 18 La. An. 222. This distinction was mainly a New York invention, and from the high judicial and commercial character of that State, it became nearly universal throughout the country at one time, and until the decision of *Swift v. Tyson*. But the New York courts, in the full tide of their experiment, were consistent in one particular at least; they denied all distinction between accepting negotiable paper in payment of and as collateral security for an existing debt. In yielding by degrees to the tide of the more recent decisions, they seem to have yielded the former point altogether. *Brown v. Leavitt*, 31 N. Y. 113; *Pratt v. Coman*, 37 N. Y. 440. They hold, too, that if such paper is given as collateral security for a loan made at the time, it will exclude equitable defences. *Bank of New York v. Vanderhorst*, 32 N. Y. 553; *Book-*

man *v.* Metcalf, id. 591. So also where other collaterals are surrendered at the time. *Park Bank v. Watson*, 42 N. Y. 490. In the case of *Bookman v. Metcalf*, the debt was upon an account stated at the time the collaterals were received, and the creditor had permission to dispose of them for money in the market. This seems to be coming so near the rule of the English courts that we should not expect to hear much more of the distinction between payment and collateral security by way of negotiable paper, even in the New York courts. They will find it much easier to yield the whole distinction, and become consistent in truth, as they formerly were in error, than to struggle against yielding a fallacy which is sure to escape their grasp, sooner or later.

There are numerous cases in the different States where the precise rule, or *ratio decidendi*, as some express it, in *Swift v. Tyson*, *supra*, has been adopted. *Conkling v. Vail*, 31 Ill. 166; *Foy v. Blackstone*, id. 538. Indeed, the rule that where current negotiable paper is accepted as payment of a pre-existing debt, equitable defences will be excluded, has become so nearly universal in the American States, that it would be a useless labor to further enumerate the cases. There has been a marked change since the preparation of the preceding note and opinion, from the effect of *Swift v. Tyson*. And since New York has given in her adherence to the rule, there seems little use in further debate upon that precise point. The recent case of *May v. Quimby*, 3 Bush, 96, takes the same view, when the paper is received in payment of a prior debt; but the late cases, even *Swift v. Tyson*, are not referred to.

All courts seem involuntarily to yield the point that the indorsee of negotiable paper delivered at the time of creating a new debt, although expressed to be as collateral security, must be regarded as a *bona fide* holder for value. *Stotts v. Byers*, 17 Iowa, 303; *Lyon v. Ewings*, 17 Wis. 61; *Curtis v. Mohr*, 18 id. 615. So also where any new credit or indulgence is given in faith of the new paper, all agree that equitable defences must be excluded. *Housum v. Rogers*, 40 Penn. State, 190; *s. r.*, *Trustees v. Hill*, 12 Iowa, 462; *Washington Bank v. Krum*, 15 id. 53. In some cases the mode of doing the business, and whether the collaterals or new securities are passed to the credit of the debtor at the time they are received, or only when they are collected, seems by some courts, to be held decisive of the point whether the holder can be regarded as a holder for value or not. *Scott v. The Ocean Bank*, 23 N. Y. 289. This latter question seems to be the same as that between the creditor becoming a party to the new paper, and only receiving it as the agent of the debtor for collection, to be applied when collected. In the latter case, of course, the creditor is never a holder for value. In all cases where the creditor so receives the new paper as to become a party to it, he does become for the time a debtor for it, and if he keeps any account of such paper, the proper mode is to pass it to the credit of the debtor, and charge it off when it proves unproductive. We apprehend this is the common course of dealings among merchants and bankers. And in such case, if the creditor reserve the right to sue upon the prior debt, still he cannot recover judgment upon the debt until he return the collaterals. They are payment until restored, or, at the least, *quasi* payment. The Court cannot know, except by their surrender, that the creditor may not have negotiated them for value; and, if so, how is the debtor to recover them?

Enough has been before said upon the question how far accepting new paper

instead of payment of an existing debt, will suspend the remedy until the maturity of the new paper. It seems to be considered on all hands that, if the new paper is in terms accepted in payment of a prior debt, the remedy is suspended until the maturity of the new paper. *Sayer v. Wagstaff*, 5 Beav. 415, 462, by Lord *Langdale*, M. R. *Re The Bank, &c.*, 11 Jur. N. S. 316; *National Savings Bank v. Tranah*, Law Rep. 2 C. P. 556; *The Kimball*, 3 Wallace, 37. In all other cases the implication will depend upon the circumstances, and may be submitted to the jury where there is any ground of controversy. *Okie v. Spencer*, 2 Whart. 253; 2 Am. Lead. Cas. 232, and notes; *Michigan Bank v. Leavenworth*, 28 Vt. 209; *Austin v. Curtis*, 31 Vt. 64, and cases cited.

It need hardly be said that, where the collaterals are not negotiable, or, if so, not so negotiated as to make the creditor a valid party to them, but are only delivered for collection or as a pledge, the effect is the same only as to suspending the remedy upon the debt, as in the case of pledging any other property as collateral security for a debt. The debt and the collaterals are wholly independent of each other, and the creditor is responsible only for actual negligence in the collection of the securities. *Van Wart v. Woolley*, 3 Barn. & C. 439. And where negotiable paper is taken as security for a debt without indorsement, although while still current and indorsed after it falls due, it will not have the effect to exclude equitable defences. *Launcester Nat. Bank v. Taylor*, 100 Mass. 18. And so if the indorsement is procured after the holder knew the paper to be fraudulent. *Whistler v. Foster*, 14 Com. B. N. S. 246, 248.

There are some other questions incidentally connected with the one already discussed, which may be here briefly adverted to. There is always a presumption as to a negotiable note or bill, when the name of the payee appears indorsed upon it, that it was done while the same was current, unless the contrary appear. *Leland v. Farnham*, 25 Vt. 553. And the admissions of the payee, made after he is thus presumed to have parted with his interest, are not competent evidence to show the time such paper was indorsed. *Ibid.* The cases are too numerous upon these points to need citation, and all in one direction.

And where negotiable paper is taken while current, it raises the presumption that it was taken *bona fide* and for value. *Pettee v. Prout*, *post*, 217. And upon the maker showing that the same was given without consideration, or was fraudulently obtained, as between the original parties, the holder cannot be required to prove that he gave value for it unless his title is in some way impeached. *Woodman v. Churchill*, 52 Me. 58. A different rule at one time obtained in the English courts. *Bassett v. Dodgin*, 10 Bing. 40; s. c., 25 Eng. Com. Law, 25; *Paterson v. Hardacre*, 4 Tannt. 114; *Heath v. Sansom*, 2 Barn. & Adol. 291. These cases are reviewed in *Sanford v. Norton*, 14 Vt. 228, and the doctrine indorsed. And there is no doubt much to be said in favor of its justice and equity, and as a safeguard against dishonest practices. But the great inconvenience of the rule, and the embarrassment thereby produced among commercial men, has caused it to be long since abandoned, and the rule in *Woodman v. Churchill*, *supra*, to be adopted, which has now become nearly or quite universal; too much so to require the further citation of cases.

What precise evidence will be required to impeach the title of the holder, must depend largely upon the circumstances of each case. It must be shown that the note was in some way discredited when the holder took it, in order to subject

him to such equitable defences as would be valid between the original parties, or that he knew of some defect in it. If the note or bill were payable at a time certain, and that had passed when the holder became a party, the cases all agree that he holds it subject to all equitable defences. A note or bill overdue cannot be said to pass in the ordinary course of business. *Farrington v. The Park Bank*, 39 Barb. 645. And it has been held that, where a note is payable by instalments, and one of the instalments is overdue, the person who takes it will be subject to all equities, on the ground that the paper was discredited at the time of the transfer. *Vinton v. King*, 4 Allen, 562. But where more than one note is executed upon the same consideration, they are not all to be regarded as dishonored, when one of them is overdue and not paid. *Boss v. Hewitt*, 15 Wis. 260. Nor will the fact that the interest had not been paid annually, according to the terms of the notes, discredit them. *Ibid.*

But there is some conflict in the cases as to the time when paper payable on demand may be said to become dishonored or discredited. In one recent case it was held never to be so discredited until after demand and refusal of payment. *Stewart v. Smith*, 28 Ill. 397. In another late case such paper was held not discredited when transferred three months after date. *Herriek v. Woolverton*, 42 Barb. 50. In *Tomlinson Co. v. Kinsella*, 31 Conn. 268, it is said that the time when a note payable on demand will become discredited will depend upon the circumstances of each case, and the understanding of the parties, and is a proper question for the jury. It has been held that a note payable on time and transferred on the last day of grace, is discredited. *Pine v. Smith*, 11 Gray, 38. The fact that the paper has been before discounted at the bank and taken up by the party benefited, will not discredit the same if it is still current. *Harpham v. Haynes*, 30 Ill. 404. Slight discount from the amount of the paper will not expose the holder's title to suspicion or defeat. *Eckhart v. Cameron*, 43 Penn. State, 120; *Baily v. Smith*, 14 Ohio, N. S. 396. But a sale very much below the fair value might have that effect. *Ibid.* But see *Brown v. Penfield*, 36 N. Y. 473, *contra*.

It is scarcely necessary to say that one must pay value for a note or bill in order to be regarded a *bona fide* holder, so as to exclude equitable defences; and it will not avail to that end that the paper was still current and in no sense discredited at the time of the transfer. *Harpham v. Haynes*, 30 Ill. 404. And if one who pays value for current paper leaves it with the payee for collection, and he transfers it for value to one ignorant of the facts, the first purchaser's title will fail, unless he can impeach the second transfer as against the holder. *Livingston v. Littell*, 15 Wis. 218. But notice to the purchaser of negotiable paper that it was given in payment of a subscription to railway stock, will not entitle the maker to show that the same was obtained by fraud. *Andrews v. Hart*, 17 Wis. 297.

The cases are all one way upon the point that even a *bona fide* holder can only recover to the extent of his interest at the time of the judgment. *Easter v. Minard*, 26 Ill. 494. This was where the plaintiffs' debt had been paid pending the action.

If the first indorsee takes negotiable paper while current, the title of his indorsee will not be affected by the fact that he acquired title after the same became due. *Lickbarrow v. Mason*, 2 Term, 63, 71; *Robinson v. Reynolds*, 2

Q. B. 196, 211; *Bassett v. Avery*, 15 Ohio, N. S. 299; *Peabody v. Rees*, 18 Iowa, 571. See also *Woodman v. Churchill*, 52 Me. 58. And the *bona fide* holder of negotiable paper is not affected by any knowledge obtained after his title becomes perfected. *Hoge v. Lansing*, 35 N. Y. 136.

Where the time of payment of a negotiable note is extended by an agreement indorsed upon the back, one who takes it afterwards will be subject to all equities between the parties. *Mareal v. Mellet*, 18 La. An. 223.

Where the acceptance of a bill appears upon its face to have been by procuration as it is called, that is, by the agent of the acceptor or by some one claiming to act as his agent, all purchasers will be affected by any want of authority in such agent. *Stagg v. Elliott*, 12 C. B. N. S. 373; S. C., 9 Jur. N. S. 158. But the acceptance of a bill drawn by procuration admits the power of the agent, and the acceptor is estopped to deny it. *Ashpitel v. Bryan*, 3 F. & F. 183; S. C., 9 Jur. N. S. 791. And where a note or bill is made or accepted in blank, this will enable the party intrusted with the paper so in blank to fill it with any amount unless there is some limitation by way of the stamp or figures in the margin. *Henderson v. Bondurant*, 39 Mo. 369.

The law in regard to acceptances and other acts in connection with negotiable paper being made in blank, is considerably discussed in *Van Duzer v. Howe*, 21 N. Y. 531, and the authorities cited and commented upon. But one very important consideration connected with the subject is not here adverted to, and does not seem to have much attracted the notice of the profession or the courts. We refer to the proper limitations indicated by a signature in blank. The person who accepts it of course understands that he may not use it beyond the amount for which it was given, and that if he do so he will incur the penalties of forgery. *Rex v. Hart*, 7 Car. & P. 652; *Reg. v. Wilson*, 2 Car. & K. 527; *Reg. v. Bateman*, 1 Cox, Crim. Cas. 186. But nevertheless for the vindication of the title of a *bona fide* holder for value, he is permitted, as in some other cases, to trace his title through a transaction which was in fact felonious. But the party guilty can have no benefit of such a filling up of the blank signature, even to the extent for which it was given. And even an indorsee for value of a blank acceptance or signature thus wrongfully filled up, cannot recover upon it, provided he were cognizant of the fact that it was issued blank and filled up by force of the authority confided to a former holder. It is the same as an acceptance by procuration. Knowledge of the fact of a note or bill having been made by virtue of an authority is sufficient to put any party taking the paper with such knowledge upon inquiry as to the extent of such authority. And whether he make the inquiry or accept the paper without it, he will be subject to any defence depending upon an excess or abuse of such authority. This is fully recognized by Vice-Chancellor *Stuart*, in *Hatch v. Searles*, 2 Sm. & Gif. 147. The learned judge said: "If the holder has notice of the imperfection [that the signature was made in blank] he can be in no better situation than the person who took it in blank, as to any right against the acceptor or indorser who gave it in blank." This qualification of the general rule laid down in the leading case of *Russel v. Langstaffe*, 2 Doug. 514, and others following it, seems to be entirely well established in the English courts. But we infer that it has not, as yet, obtained recognition with us to the same extent, although in principle it seems most unquestionable.

But as a general rule it will not be sufficient to show facts known to the holder

before purchase, sufficient to put him upon inquiry, as was formerly held in *Gill v. Cubitt*, 3 Barn. & C. 466. That case was overruled in *Goodman v. Harvey*, 4 Adol. & Ellis, 870; and it is now entirely well settled that, in order to impeach the title of the purchaser of current negotiable paper, it must be shown that he acted in bad faith, believing at the time of the purchase that there was some infirmity about the paper. This is rather an extreme view, and not required in any other similar case, but it has been considered necessary in order to protect the title to negotiable paper, and is settled beyond all question. See *Goodman v. Simonds*, *post*, 239. It could answer no good purpose to say what is most unquestionable, that the doctrine of *Gill v. Cubitt* will answer the necessities of fair dealers in most cases, since that class of holders will not ordinarily shrink from the strictest scrutiny in regard to the circumstances under which their title was acquired.

The more recent decisions are all based upon *Goodman v. Harvey*; and *Gill v. Cubitt* is never named except to be condemned. We recollect the time when the doctrine of the latter case was regarded as quite commendable, and entirely salutary. And while the English courts now require proof of bad faith in the purchase in order to impeach the title of the holder, it is not uncommon there to find cases submitted to the jury upon that question, where the evidence would not seem of the most conclusive character, not more so than that required in *Gill v. Cubitt*. We should not be surprised to have the pendulum of judicial opinion swing back more and more in that direction, until we reach the old equitable ground of notice sufficient to put the party on inquiry, — the same rule by which all our other legal and equitable rights are considered as sufficiently protected, and which might be sufficient for the holders of negotiable paper if it were not considered specially sacred. See *Dailey v. De Frees*, 11 W. R. 376; *Steinhart v. Boker*, 34 Barb. 436; *Benior v. Paquin*, 40 Vt. 199; *Bassett v. Avery*, 15 Ohio, n. s. 299. But the doctrine of *Goodman v. Harvey* is now too well established to be called in question. We only desire that speculators in negotiable paper shall be content to shield themselves under the rule in that case, and not ask the courts finally to hold that nothing short of proof of a felonious intent shall impeach their title.

There seems to be some conflict in the recent cases, how far the fact of negotiable paper being made or indorsed for the accommodation of the parties in interest will afford ground of defence against holders for value, but who received the same when overdue, or with notice that it was accommodation paper. It was held at an early day, *Charles v. Marsden*, 1 Taunt. 224, that it afforded no ground of defence to a note taken before due for value, that the indorsee knew at the time that the maker made it for accommodation of the payee. And the same rule has been since repeatedly recognized. *Powell v. Waters*, 17 Johns. 176; *Grandin v. Leroy*, 2 Paige, 509; *Bank of Ireland v. Beresford*, 6 Dow, 237. And if the indorsee knew of the fact of the paper being made for accommodation at the time he received it, there could be no difference whether he took it before or after it fell due. The question would be in either case, how far the fact of its being given for accommodation afforded ground of defence in the hands of the holder for value. And that question, as it seems to us, will always depend upon whether the paper was used by the party accommodated in the manner contemplated by the original parties, and especially by those signing or indorsing for accommodation. It is true that this question will not be important where the

paper passes while current; but where the paper is taken when overdue, or with knowledge that it was given for accommodation, the defence is equally available. And in both cases the proper question seems to be, whether the paper was misapplied by the party accommodated. If not, the holder for value may recover to the extent of his interest. *East River Bank v. Butterworth*, 45 Barb. 476. But in a recent case, *Chester v. Dorr*, 41 N. Y. 279, by a divided court, a contrary rule seems to be declared. That was an action against an accommodation indorser. No question is made in the opinion, whether the party accommodated used the paper differently from what he was expected to do. The majority of the Court seemed to consider that, unless the paper was negotiated while current, all parties signing for accommodation might claim to be exonerated. This has certainly not hitherto been the understanding of the profession in regard to accommodation paper, unless the paper was in some way misapplied by the party accommodated. The Court here argued that the indorser for accommodation was entitled to make the same defence against a purchaser for value after the note fell due, which he might if the action were for the benefit of the party accommodated. But this will surely not be so where the indorsement is made to enable the party accommodated to negotiate the paper, to raise money, or to secure or pay his own debts. In such cases the indorser is equally bound, whether the transfer is made before or after the paper falls due, and whether the purchaser knew the indorsement was made for accommodation or not. To hold otherwise would be to encourage fraud, and to relieve the party from the very responsibility which he expected to meet, and which, upon every principle of justice and fair dealing, he should be compelled to abide by.

SENECA PETTEE v. RICHARD PROUT.

(3 Gray, 502. Supreme Court of Massachusetts, September, 1855.)

Presumption of title. — In an action upon a note payable to A, or bearer, the production of the note by the plaintiff, B, is sufficient evidence of his title, though he is the general agent of A, who, the answer alleges, is the owner of the note.

Equities. — One to whom a note payable to A, or bearer, is transferred before maturity, takes it subject to no equities or rights of set-off which the maker might have against A.

ACTION OF CONTRACT on a promissory note for \$50, dated March 14, 1851, signed by the defendant, and payable in one year to the Cheshire Iron Works or bearer, with interest. The defendant, in his answer, denied that the plaintiff was the owner and bearer of the note sued upon, and alleged that it was the property of the Cheshire Iron Works; and also filed a declaration in set-off upon the following note: “\$49.74. Cheshire, June 11, 1851. Six

months after date we promise to pay to the order of Gilman Bowker, forty-nine dollars $\frac{74}{100}$, value received, ten dollars of which is to be paid in goods, with interest.

“Cheshire Iron Works, by S. Pettee, general agent.”

The case was submitted to the Court upon a statement of facts, in which it was agreed that the plaintiff was the general agent of the Cheshire Iron Works; that the two notes were duly executed on the days of their respective dates; that the note in set-off was assigned by the holder thereof to the defendant, for a valuable consideration, with the intention of securing a debt against the Cheshire Iron Works; that the Cheshire Iron Works were insolvent, and had no property; and that their stockholders, of whom the plaintiff was one, were individually liable for their debts.

There being no evidence to whom the note sued upon belonged, beyond the note itself, the defendant contended that the plaintiff had not proved his title to the note; and further contended that if he had, the note for \$49.74 should be allowed in set-off.

SHAW, C. J. The plaintiff brings his action, as bearer of a note made by the defendant to the Cheshire Iron Works or bearer. He therefore claims as the holder of a negotiable promissory note, payable on time, and not dishonored; and if he establishes this title by proof, he is entitled to the same privileges and immunities as an indorsee, having taken a note by indorsement in the course of business, before it has become due. He is not subject to any equities as between the promisor and the original payee, nor to the set-off of any debt, legal or equitable, which the promisor may afterwards acquire. *Wheeler v. Guild*, 20 Pick. 545. By giving a note payable to bearer at a future day, which is strictly a negotiable note, the defendant agreed to pay the amount to any person to whom it should be transferred, before the day of payment, without claiming to set off any demand which he then had or might have, against the promisee. It is in this respect like mercantile notes (in use, we believe, in some of the States where the law allows set-offs and other equitable defences, even against indorsees of promissory notes), payable “without defalcation,” thereby meaning, by force of the contract itself, to bind the maker to pay the amount absolutely to the regular holder, and renouncing any benefit of set-off or other equitable defence against the payee.

Then the question is, as to the proof. Where a plaintiff brings

the note declared upon in his hand, and offers it in evidence, this is not only evidence that he is the bearer, but also raises a presumption of fact that he is the owner; and this will stand as proof of title, until other evidence is produced to control it. Ordinarily, such bearer, relying on the general presumption, has no means of proving the transfer of the note to himself.

The defendant contends that, as the plaintiff was the general agent of the corporation to whom the note was payable, and, as such, had the custody of all their notes, his possession may have been the possession of the corporation. But we think this fact alone is not sufficient to rebut the general presumption.

The demand relied on by the defendant is a note signed by the Cheshire Iron Works, payees of the note in suit, and payable to order; still it was not negotiable, because payable in part in goods. A negotiable note must be payable in money. But though the defendant could not sue on this note in his own name, yet we believe by the Rev. Sts. c. 96, § 5, as the assignee of a chose in action, the holder of such note might use it as a set-off, in a proper case, as against a suit brought by the debtor, in the same manner as if it were a legal debt. But it is unnecessary further to remark on the validity of the set-off; the ground of our decision is, that the plaintiff held the note in suit under such a title that no demand of the defendant, legal or equitable, against the Cheshire Iron Works, could avail him as a set-off.

Judgment for the plaintiff.

See *Ellicott v. Martin*, 6 Md. 509; *Goodman v. Simonds*, *post*, 239; *Picquet v. Curtis*, 1 Sumner, 478; *Hunter v. Kibbe*, 5 McLean, 279; *Warren v. Gilman*, 15 Me. 70; note to *Swift v. Tyson*, *ante*, 213; and the following case.

JOHN M. WAY v. IVORY W. RICHARDSON.

(3 Gray, 412. Supreme Court of Massachusetts, March, 1855.)

Presumption of title. — It is not competent for the defendant to deny that the plaintiff is the owner and holder of a note upon which he brings suit as such, without traversing the signature, or the indorsement, or the delivery of the note ; and in such case evidence is inadmissible to prove that the plaintiff never owned the note, and never employed counsel to prosecute the action, and that he had no interest in the suit.

ACTION OF CONTRACT on a promissory note for \$100, made by the defendant, payable to his own order, and thus indorsed : “ I. W. Richardson,” “ Without recourse, J. Wetherbee, Jr.” Answer, that the defendant executed the note declared upon, without any consideration, and for the accommodation of Nathaniel Richardson ; that the note was delivered by Nathaniel Richardson to Wetherbee, and, at the time it fell due, was in the hands of Wetherbee, and held by him, and was paid by Nathaniel Richardson to Wetherbee while it was so in his hands ; that Wetherbee is still the owner of the note, and that this suit is prosecuted for his benefit ; and that if the plaintiff is the owner of the note, he received it after it had been paid and was overdue, with a full knowledge that it was an accommodation note, and had been paid, and that he paid no consideration for it. Trial in the Court of Common Pleas at January term, 1854, before *Wells*, C. J., who signed the following bill of exceptions : —

“ The plaintiff read the note declared on and the indorsements thereon to the jury, and rested his case. The defendant then offered to prove that the plaintiff in this action never owned the note declared upon, and never had said note in his possession, nor employed counsel to pursue or prosecute said action ; and that the plaintiff had no interest in the suit or judgment, should one be recovered in his favor ; and that the note was never assigned to the plaintiff by delivery or otherwise ; and that the plaintiff never paid any thing for said note. To this the plaintiff objected, upon two grounds : first, that it was not admissible under the defendant’s answer ; second, that if proved, it would form no defence to this action. And the Court rejected the evidence. The defendant offered no other evidence, and the Court directed a verdict for the plaintiff. To all which rulings of the Court the defendant excepts.”

SHAW, C. J. The evidence offered by the defendant was rightly rejected. Independently of the consideration that it was not specified in the answer, the evidence would have constituted no defence. The action was upon a note made by the defendant, payable to his own order, and by him indorsed in blank, and then by Wetherbee indorsed in blank, by which the plaintiff, if holder, had a right to fill up the indorsements, and make the note payable to himself, as second indorsee, which we are to presume was done, or considered as done, at the trial. The genuineness of the signature and indorsements was admitted. This, with the production of the note, was *prima facie* evidence of title, and good unless rebutted; for, although Wetherbee's indorsement was "without recourse," yet this was as effective to transfer the note, as if those words had not been used: it was a blank indorsement.

The plaintiff, by his attorney, whose authority to appear it was then too late to contest, produced the note at the trial; the plaintiff's possession must be presumed to be lawful, and to have existed from the time of the indorsement, until the contrary appeared; and no evidence to the contrary was offered. It was not competent for the defendant to deny that the plaintiff was the owner and holder of the note, without traversing the signature, or the indorsement, or the delivery of the note, which he did not offer to do.

The plaintiff was not bound to prove that he gave value for it; the first indorsee might have given it to him, or authorized him to sue on it as his trustee. If the plaintiff's possession of the note was lawful, it must have been delivered to him by the holder.

Had the defendant even proved what in his answer he proposed to prove,—that the note was indorsed to the plaintiff after it was due,—this would not have been of itself a defence. A note does not cease to be negotiable and transferable by indorsement or delivery, when it becomes due. Such proof would merely have let in the defendant to prove that it had been paid to some antecedent holder, or that he had a good defence against the plaintiff's indorser. But no offer was made of any such proof.

The cases cited by the defendant afford no authority to sustain a contrary view. In *Richardson v. Lincoln*, 5 Met. 201, there was a constructive delivery of the note to the plaintiff's attorney, simultaneous with the indorsement. In *Emmett v. Tottenham*, 8 Exch. 884, the decision was placed distinctly on the ground that

the action was brought upon a copy of the note, and that there was no delivery of the note to the plaintiff, or to any one as his agent, until some time after the commencement of the action.

Exceptions overruled.

See *ante*, note to *Swift v. Tyson*, p. 213, also the preceding case and citations.

DAVIS *et al.* v. MCCREADY *et al.*

(17 N. Y. [3 Smith], 230. Court of Appeals of New York, March, 1858.)

Defence of breach of executory agreement.—It is no ground of defence to an action against the acceptor of a bill that the holder was informed that it was accepted in consideration of an executory contract, if he had no notice of its breach.

ACTION by indorsees against acceptors of a bill of exchange accepted in part-payment for the price of a brig. It was agreed that the vessel should be put in good repair, and made tight, staunch, and strong. Defence that this agreement had not been performed. Plaintiffs paid full value for the bill, and took it with a knowledge of the said agreement: but without knowledge of the breach.

DENIO, J. The sale of the brig and the executory agreement of the vendors to make the necessary repairs to render her seaworthy, formed a good legal consideration for the acceptance of the bill. When, therefore, the plaintiffs at the time of receiving it were informed that it was accepted on that consideration, they were not notified of any fact which impeached its validity or rendered it in any respect suspicious. If they had known nothing of the consideration upon which it was given, they would nevertheless have been *bona fide* holders, and they are not in a worse condition because they had been informed that it was accepted on account of a transaction legal in itself, and which formed an adequate consideration for the undertaking of the acceptance. Considerations founded upon reciprocal promises of the parties are of common occurrence in business, and bills and notes supported by such considerations have always been held valid. It is upon this principle that cross notes or acceptances for mutual accommodation have been upheld whenever they have come before the courts.

Cameron v. Chappell, 24 Wend. 94, and cases cited by Nelson, J. ; Dowe v. Schutt, 2 Denio, 621. In the first of these cases the acceptance sued on was given in consideration of a promise by the drawer to send the acceptor six hundred bushels of wheat at the opening of navigation the ensuing year. The bill became payable the twelfth of May, after the time when the wheat should have been delivered, and it was shown it never had been delivered. The Court held that the acceptance was not for accommodation, but was business paper, and was valid in the hands of the drawer, so that usury could not be set up against the plaintiffs, who had discounted it for a premium beyond the legal rate of interest. If one will issue his negotiable paper and send it into the world, in consideration of an engagement of the party with whom he deals to do some act for his benefit in future, he declares in effect that he will pay the note or bill according to its terms to any one who shall become the holder for value in the course of business, and rely for his own indemnity upon the promise he has received as the consideration for issuing it.

The plaintiffs were not bound to inquire whether the vendors of the vessel had performed their agreement. A party receiving a bill is not put upon inquiry unless circumstances of suspicion have come to his knowledge ;¹ and I have already said that there was nothing suspicious or out of the common course of business, in the circumstances out of which this bill arose. The agent of the acceptors chose to rely upon the personal responsibility of the vendors of the vessel so far as the repairs were concerned. As they gave their acceptance upon time, which they knew might be transferred to a *bona fide* holder the next day, so it is presumed they would have parted with their money upon the personal engagement of the vendors if a delay in payment had not been material to them. It would not, in my opinion, alter the case if it could be shown that the vendors, the payees of the bill, had broken their contract respecting the repairs before they negotiated the paper to the plaintiffs, it being found that the latter had no notice of the breach. The plaintiffs were not bound to follow up the transactions between the original parties to the bill. To hold otherwise would attach an inconvenient and repugnant condition to such an acceptance. By accepting simply and unconditionally a negotiable bill, the defendants are to be held as intending to give

¹ Nothing short of proof of bad faith will repel the *prima facie* title of the holder. See Goodman v. Simonds, *post*, 239.

it all the qualities of commercial paper, one of which is that it shall circulate freely for the purposes of business, and be available in the hands of any holder for value. To decide that one who proposed to purchase it, and who had a knowledge of the nature of the transaction upon which it was given, must await the consummation of that transaction, would essentially impair its character and legal effect. But in this case it was not known to any one that the payees had broken their agreement when the plaintiffs took the bill. The payees insisted that they had sufficiently repaired the vessel before she was sent to sea, and the plaintiffs' agent, though he distrusted her condition as to seaworthiness, concluded to receive and despatch her on her voyage to New York. Before she arrived at her destination the plaintiffs purchased the bill. After that it was demonstrated by the event that the repairs were insufficient; for she leaked to such an extent as to damage the cargo, and required extensive repairs upon her arrival. If, therefore, the plaintiffs had made inquiries when the bill was offered to them they would have learned that the plaintiffs' agent had accepted the brig as a seaworthy vessel, and had sent her to sea. So far from casting suspicion upon the bill this intelligence would have confirmed them in the belief that it ought to be paid according to its tenor. I conclude, therefore, that there were no merits in the defence.

All the rulings of the referee to which exceptions were taken, but one, related to testimony concerning breach of the agreement of repairs, and the damages consequent thereon. The questions overruled were wholly immaterial, because the plaintiffs could not be affected by the breach and were not responsible for the damages. There is an exception of a different character. Before the brig sailed, the defendants' agent made complaints to the vendors of the insufficiency of the repairs; the latter declared them sufficient. The agent was sworn on behalf of the defendants, and testified that upon an occasion when he made such complaint, Mr. Davis, one of the plaintiffs, was present. This testimony was given without objection. Subsequently, the defendants offered to prove by the same witness that Davis was present when he made such a complaint, and it is stated that the referee overruled the offer. The desire seems to have been to repeat the evidence already given. The fact that one of the plaintiffs was present when the complaint was made had some tendency to show that he had knowledge of the breach of the condition; and the ruling cannot be defended

except on the supposition that the offer was rejected because the fact was already sufficiently proved. It does not appear what the objection was which the plaintiffs' counsel made, or indeed that he did object. A party seeking a new trial on account of an erroneous exclusion of evidence, must show that he may have been injured by the ruling. As the precise fact sought to be proved was already in evidence, no prejudice could result from the referee's refusing to have it repeated. These views lead to the affirmance of the judgment of the Court of Common Pleas.

All the judges concurring,

Judgment affirmed.

In *Craig v. Sibbett*, 15 Penn. State (3 Harris), 238, it is held that the mere knowledge of the holder of the terms of the arrangement between the drawer and acceptor is not material. In this case the holders were told that the bill was drawn against flour shipped by the drawer to the acceptor, and the bill of lading was indorsed to them as security in case of non-acceptance. But the fact was that the signature of the bill of lading was fraudulently procured. Per *Gibson, C. J.*: "The only additional matter is that the bill of lading was indorsed to the plaintiffs as a security in case of non-acceptance; and that it was presented to the defendants with the bill of exchange; whence an argument that, as the plaintiffs were apprised of the course of dealing, they must have known the acceptance was on a tacit condition that the flour should be forwarded. Has it ever been supposed that the purchaser of a bill drawn against cotton to be shipped to Liverpool is bound to guaranty the delivery of it? . . . The cases show that the payee looks only to the terms of the acceptance; and that when he has acted in good faith, he is not to be prejudiced by the acts of the drawer."

BREWSTER v. McCARDEL.

(8 Wendell, 478. Supreme Court of New York, January, 1832.)

Postdated paper. — An indorsee for value of a postdated note may recover thereon, though he took it before the date at which it purported to be executed.

THE case is sufficiently stated in the opinion of the Court.

SUTHERLAND, J. The judge erred in charging the jury that the circumstance of the note having been negotiated to the plaintiff before the day when it bore date was a strong circumstance of suspicion sufficient to put him upon inquiry, and that he therefore

took it subject to any defence which might be made as against the original payee.

The note was actually made and delivered to the payee in October, 1828, although it bore date in May, 1829, and was payable ninety days after date. It was transferred to the plaintiff for a valuable consideration in February, 1829, six months before it became due. The date of the notes is in no respect material, except for the purpose of determining when it is payable. There is no legal objection either to antedating or postdating a note, and I am not prepared to say that either is, in itself, and disconnected from other circumstances, a legal ground of suspicion, so as to put the indorsee upon inquiry and subject him to all the equities existing between the original parties; 7 Cowen, 337; Chitty, Bills, 77. The Court of King's Bench in *Pasmore v. North*, 13 East, 516, held that a note which was *postdated*, and which was transferred to the plaintiff before the day when it bore date, could not be questioned or impeached by the maker. That case is not distinguishable from this, and I think was rightly decided upon the well-established principles applicable to negotiable paper.

A new trial must therefore be granted, the costs to abide the event.

See Chitty, Bills, 149; Story, Promissory Notes, § 48.

THOMAS BAYLEY *et al.* v. JOHN TABER *et al.*

(5 Massachusetts, 286. Supreme Court, May, 1809.)

Note void by statute. — Commercial paper declared void by statute is void even in the hands of a *bona fide* holder for value; and, therefore, where promissory notes were antedated to avoid a statutory prohibition; *held*, that in an action against the maker he could prove the actual date at which they were made and issued, even against an innocent indorsee.

THE declaration in this action contained thirty-seven counts upon as many promissory notes, alleged to have been made by the defendants, each under five dollars, payable to bearer on demand, for value received, and bearing date between the third day of October and the thirtieth day of December, 1804.

The action was tried upon the general issue, before *Parker, J.*, at the sittings after the present term.

At the trial, notes comports with the several counts were produced in evidence, all bearing the impression of plates, types, or printing. The signature of the defendants to all of them was admitted.

The defendants offered to prove that some of the notes declared on were in fact made and issued by them after the first day of April, 1805, though bearing date before that day; and that the notes which had been so made were antedated by them, to avoid the operation of the Statute of 1804, c. 58, which declares notes of the like description, made or issued after that day, to be utterly void.

PARKER, J. This cause was tried before me at the sittings after the last law term in Cumberland, in May last; and I then inclined to the opinion, that the defendants should not be permitted to allege a falsity in an instrument made and signed by themselves, and which had by them been put into general circulation as money. Notes of this description, under the denomination of Taber's notes, to a large amount, having become a common currency in the district of Maine, it suddenly struck me as inconsistent with the common principles of justice, and the policy of the law, that the promisors in those notes should be allowed to avoid payment of them to an innocent holder, by alleging that they bore false dates, and by showing that in uttering them they had contravened the laws of the Commonwealth.

I therefore rejected the evidence offered; but very soon after the trial, having revolved the question in my mind at more leisure, I came to doubt of the correctness of my opinion, and intimated my desire to the counsel, that the question should be reserved for the consideration of the whole Court. This was done in such manner as to cause very little delay, and no inconvenience to the parties or their counsel; it having been agreed that the question should be taken up by the Court at this adjourned session, and that the arguments of the counsel should be reduced to writing, and transmitted to the Court.

Upon an attentive consideration of the question, and of the arguments sent to us, which on both sides are concise and perspicuous, we are unanimously and clearly of opinion, that the facts proposed

by the defendants to be proved to the jury at the trial, constitute a good defence against the counts, to which those facts are applicable, and that it is competent to the defendants in this action to set up and maintain such defence.

The Statute of 1804, c. 58, § 1, enacts that all bills, notes, checks, drafts, or obligations whatsoever, under the amount of five dollars, payable to bearer or to order, shall be wholly in writing; and that all notes, &c., under the aforesaid amount, and payable as aforesaid, which should be made or issued after the first day of April then next, and which should bear the impression of types, plates, or printing, should be utterly void, and that no action should be thereon sustained in any court of law.

The second section of the same statute imposes a penalty upon any person who should issue or pass any of the securities described in the first section, after the said first day of April, which was April, 1805.

The same statute, c. 134, imposed an increased penalty upon any person who should, after the tenth day of the same April, issue or pass like notes, other than those of incorporated banks, for a less sum than five dollars, or whereon less than five dollars should be due, with intent that the same should be circulated as currency.

The statute first cited is peremptory and unequivocal, in enacting that all notes like those declared on in this action, made *or* issued after the first day of April, 1805, shall be utterly void; and it prohibits the sustaining of any suit upon them in any court of law. The defendants say, and they offered to prove, that some of the notes sued in this action *were* made and issued after that day. To reject the proofs of these facts, because the defendants are the original promisors, and because the plaintiffs may be supposed to be innocent holders of the notes for valuable considerations, would be, to all intents and purposes, to defeat the operation of the statute, and would amount to a judicial repeal of an act of the legislature.

The maker of a note payable to bearer is generally the only person to be called upon for payment, it passing from hand to hand, on the credit of the promisor's name, like bank-bills, the receiver seldom requiring any guaranty from him who passes it. Now the declared object of the legislature was entirely to prevent the circulation of such paper. But if by giving a fictitious date to them, the maker is prevented from showing that they were made or issued after the time when they were declared by the statute to be void,

they would continue to circulate, as long as there should be confidence in the ability of the makers to pay them.

However hard the operation of the statute may appear to be against persons, into whose possession such notes may have come *bona fide*, and for a valuable consideration, it is an hardship created by law for the public good, and the courts of law are prohibited from granting any relief against it.

Nor is it altogether certain that the receivers of such notes are free from blame, although not privy to the actual making or antedating of them. The laws of the government are presumed to be known by all the citizens. If the notes were *in fact* made or issued after they were declared void by statute, and after a penalty was attached to the passing of them, although no penalty is expressly enacted against the receiver; yet the act of receiving was necessary to enable the offender to pass them, and in this view the receiver may be considered as having aided in the offence of passing. Nor is it improbable that the legislature contemplated the punishment of the receiver, when they took from him all power of coercing payment of such notes in the courts of law. But be this as it may, whether the plaintiffs in this action are innocent or not, to authorize them to maintain a suit, and recover judgment on notes of this description so situated, when the legislature has declared them to be utterly void, would be effectually to annul an act, the wisdom and policy of which the legislature alone had the right to determine.

Nor is it a novel doctrine, that a person shall be permitted to avoid his contract by alleging his own criminality, provided it consists in the violation of some positive statute of the government. Contracts, the consideration of which is money won at play, or loaned at unlawful interest, have always been subject to the same rule, not only against those who participated in the offence, but even against innocent indorsees, when they have claimed the performance of such contracts.

The case of *Lowe v. Waller*¹ shows this long to have been the law in England; and it is understood that the like principle has been uniformly adopted and practised upon by the courts in this country.

It has been suggested by the counsel for the plaintiffs in the close of their argument, that to make this a good defence, it should have

¹ Doug. 736.

been specially pleaded. But it is not necessary ; for in *assumpsit*, every thing which destroys the right of action may be given in evidence under the general issue.

Indeed, there seems to be no room to doubt upon this question ; and nothing but a reluctance to permit a man to avail himself of a falsity in circulating these notes, and afterwards to avoid payment by showing the truth, could have caused a hesitation at the trial.

The verdict must be set aside, and a new trial granted.

See following case and note.

ALEXANDER PATON v. AUGUSTUS B. COIT *et al.*

(5 Michigan [1 Cooley], 505. Supreme Court, October, 1858.)

Illegal consideration. Burden of proof.—Whenever the consideration of negotiable paper between the original parties has been illegal, especially if it is as to them in violation of a positive prohibition of statute, proof of such illegality throws upon the indorsee the burden of proving that he took it *bona fide*, and gave value for it.

ASSUMPSIT against the acceptors of a bill of exchange given for intoxicating liquors sold in violation of the Prohibitory Liquor Law, which makes such paper “utterly null and void against all persons, and in all cases, excepting only as against the holders,” “who may have paid therefor a fair price, and received the same upon a valuable and fair consideration, without notice or knowledge of such illegal consideration.”

The plaintiffs were indorsees of the payees.

On the trial, the acceptance having been given in evidence, the plaintiff rested.

The defendant then introduced a witness, and being required to state what he expected to prove by such witness, stated that he expected to prove that such acceptance was given in payment and as security for ten barrels of intoxicating liquor, called whiskey, purchased by defendant, of the drawers of said draft, on the thirtieth day of March, 1857, in Detroit.

The plaintiffs objected to such evidence, upon the ground that under the exception in section two of the Prohibitory Liquor Law of 1855, the presumption was that said draft was in the hands of

Montague Robinson

bona fide holders, to wit, the plaintiffs; and that the *onus* was on the defendant to show, or propose to show, notice before said testimony could be received. The Court sustained the objection, and refused to allow the testimony to be given; and defendant excepted.

Judgment having been rendered for plaintiffs below, for the amount of the acceptance, the defendant brought the case to this Court by writ of error.

CHRISTIANCY, J. Whether the evidence in this case was properly rejected, does not depend upon the question, Whether, standing alone, it would have constituted a complete defence against the draft in the hands of a *bona fide* holder for value; but, Whether it would have been sufficient to throw upon the plaintiff the burden of proving himself to be such *bona fide* holder; or, Whether, in fact, the evidence tended, *prima facie*, to establish a defence.

It is assumed by the counsel for the defendants in error (plaintiffs below), that the only effect of the statute in reference to negotiable paper given for liquors sold, "is to render such paper without consideration as between the immediate parties," and that "the effect of the exception in section two is simply to put this statute *equity* on a footing with all other equities" between the original parties to negotiable paper.

If this be the only effect of the statute, then, according to the prevailing current of recent decisions, the evidence was properly rejected, though the cases upon this point are by no means uniform; and we do not wish to be understood as giving any opinion upon the question presented by this hypothesis, as we do not think it involved in the present case.

The defence here proposed was not merely the *want*, but the *illegality* of consideration: and this, being allowed as a defence between the original parties, irrespective of and even contrary to the equities of the parties, cannot, without perversion of language, be called an equity. It is not on the defendants' account that such a defence is allowed, as will more fully appear in the sequel.

The effect of the statute in question is not merely to render such paper without consideration, but absolutely *void and illegal*, between the immediate parties, and all others who have not obtained it for value, and without notice,—not only void in the

negative sense of having no legal basis, but affirmatively illegal as violating the positive provisions of the statute. It was not even contended that the facts offered to be shown by the defendant would not have made a *prima facie* case of an illegal sale, without showing that the sale did not come within any of the exceptions of the statute; and if the plaintiffs claimed to maintain the validity of the sale under any such exception, the burden of proof (this being a civil case) rested upon them to bring it within the exception.

Now, upon principle, as a question of statute construction, and without reference to any authority, when the statute expressly declares all such paper void and illegal, and forbids any action to be brought or maintained upon it, "except when brought by a *bona fide* holder who has received the same upon a valuable and fair consideration without notice or knowledge," &c., it would seem to follow as a logical necessity, that when the paper is shown to have been given for such illegal consideration, the plaintiff's right of recovery is cut off by the general prohibition of the statute, unless, in avoidance of this, he gives evidence of those facts which alone can bring him within the exception.

We do not propose to give a definite opinion upon the point, whether, the illegality being first shown, the burden of proof in this case would have rested upon the plaintiffs to show actual want of notice; this might be requiring actual proof of a negative. But we are inclined to the opinion that they should have shown the nature of the transaction accompanying the transfer; and if that disclosed no suspicion of such notice, it might make a *prima facie* case of want of notice, and throw upon the defendant the burden of proving notice. But the amount of the consideration given by the plaintiff is distinct from the question of notice, and the absence of such consideration, in such a case, would be a defence, though the paper had been taken by the plaintiff without notice. The amount of consideration given by the plaintiff is an affirmative fact peculiarly within his own knowledge, and not generally in that of the defendant, and being necessary to bring the plaintiff's case within the exception of the statute, should be proved by him. To allow him to recover without such proof, would be an evasion of the statute. Such proof (the illegality being first shown) is a necessary part of the plaintiff's case, without which he shows no *prima facie* right to recover;

and though, in ordinary cases, this fact would be presumed in favor of the holder, this presumption can never be allowed without proof, when the paper was absolutely void between the original parties, on the ground of fraud, illegality, or duress.

This construction of the statute is sustained by authority. In England, by the statute of Anne, a note or bill given or indorsed upon a usurious consideration, was void, even in the hands of a *bona fide* holder for value, Chitty, Bills, 9 Am. ed. 110; but the statute, 58 Geo. III. c. 93, made such note valid in the hands of a *bona fide* holder for value without notice. In the case of *Wyat v. Campbell*, 1 Mood. & M. 80, where the note had been indorsed by a previous indorser upon a usurious consideration, and no notice given to plaintiff to prove consideration, it was contended that the plaintiff was not bound to prove it. But, by Lord *Tenterden* C. J.: "The statute, 58 Geo. III. c. 93, makes a note tainted with usury valid in the hands of a *bona fide* holder; the *onus* is therefore upon the holder to prove he is such; otherwise the statute does not apply, and the note is void under the statute of Anne."

In that case, it is true, the exception was in a subsequent statute; here it is in the same statute; but we are unable to perceive how this can make any difference as to the burden of proof. If the fact was not to be presumed in that case, it cannot be in this.

But whether this conclusion be right or wrong, as depending purely upon a question of statute construction, can make little difference in this case. The rule as to the burden of proof is the same upon principle and authority at common law. Whenever the consideration of the paper between the original parties has been illegal, especially if in violation of a positive prohibition of statute, proof of such illegality throws upon the holder the burden of proving that he got it *bona fide*, and gave value for it. *Northam v. Latouche*, 4 Car. & P. 140; *Bailey v. Bidwell*, 13 Mees. & W. 73; *Harvey v. Towers*, 6 Exch. 656; *Smith v. Braine*, 16 Q. B. 201; *Fitch v. Jones*, 32 Eng. L. & Eq. 134; *Vallett v. Parker*, 6 Wend. 615; *Edwards*, Bills, 686, 687; Chitty, Bills, 11th Am. ed. 661, 662; Story, Bills, § 193.

The case of *Bailey v. Bidwell* is directly in point; and *Parke*, B., gives a very satisfactory reason why the fact in question is not to be presumed for the plaintiff. "If," he says, "the note were proved to have been obtained by fraud, or affected by illegality,

that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it." The subsequent case of *Fitch v. Jones*, above cited, shows that in such case the original payee is still presumed to be the owner, and that the plaintiff sues for his benefit; and it is to overcome this presumption that the plaintiff is required to prove himself a *bona fide* holder for value.

The rule is the same as to the burden of proof, where it is shown that the paper was obtained by fraud or duress, and when stolen, or put in circulation by fraud. See authorities above cited, and *Mills v. Barber*, 1 Mees. & W. 425; *Holme v. Karsper*, 5 Binn. 469; *Aldrich v. Warren*, 16 Me. 465; *N. Y. & Va. State Stock Bank v. Gibson*, 5 Duer, 574. In fact, many of the cases, and most of the elementary works, place illegality in the same category with fraud or duress, as casting the burden of proof upon the holder.

But while the result is the same, it is manifest that the basis of the rule in the case of illegality, though equally solid, is quite different. In the case of duress and fraud, as well as where the paper has been stolen, the *equities* of the defendant constitute the basis of the rule. But in the case of illegality of consideration, both parties are generally equally in fault; and it is not to protect the equities of the defendant, but on broad grounds of public policy, — to uphold the law, and to discourage its violation or evasion, — that the burden of proof is cast upon the plaintiff. It is as much the duty of courts to discourage the violation or evasion of law as to protect the equities of parties. And it is upon this principle only that the naked defence of illegality is allowed. See opinion of Lord *Mansfield* in *Holman v. Johnson*, 1 Cowp. 341. And upon this principle, courts should be careful to avoid doing any thing to facilitate the enforcement of such contracts, unless it appear affirmatively that the plaintiff is not in fault, and that he has real equities to be protected.

The evidence offered was improperly rejected. The judgment must be reversed, and a new trial granted.

All the justices concurred.

There is no controversy in regard to the law upon the subject discussed in the two preceding cases. Where negotiable paper is by statute declared void *ab initio*, it will be so held in the hands of a *bona fide* holder. *Aurora v. West*, 22 Ind. 88. But it was held in *Marine Bank v. Clements*, 31 N. Y. 33, that in order to render a note, transferred by an insolvent corporation void in the hands of a *bona fide*

holder, it must appear that the corporation was either insolvent at the time or then contemplating insolvency, and that the transfer was made to give a preference to particular creditors. But in the absence of statutory provisions declaring the securities void, the *bona fide* holder will not be affected by any illegality in the consideration of negotiable securities. Story, Promissory Notes, § 192; Williams v. Cheney, 3 Gray, 215: opinion by Bigelow, J., and cases cited; Hubbard v. Chapin, 2 Allen, 328. Savage, C. J., in Vallett v. Parker, 6 Wend. 615, 622, lays down the distinction between paper declared void by the legislature and by the courts. He says: "Wherever the statutes declare notes void, they are and must be so in the hands of every holder; but where they are adjudged by the Court to be so, for failure or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with or have had notice of the consideration."

See Goodman v. Simonds, *post*, 239, and note; *ante*, note to Swift v. Tyson, 186; also Bayley v. Taber, *ante*, 229; Fowler v. Brantly, *infra*.

SAMUEL L. FOWLER, Plaintiff in Error, v. HARRIS BRANTLY
et al., Defendants in Error.

(14 Peters, 318. Supreme Court of the United States, January, 1840.)

What sufficient to put the holder upon inquiry. — A note made payable to the cashier of a bank, and drawn within a peculiar form to be within the usages of the bank, was sent to an agent to procure a discount at the bank. The note was rejected, and marked in pencil, with a mark employed by the bank to indicate that it had been offered and refused. The agent then sold the note and applied the proceeds to his own use. *Held*, that the note on its face was sufficient to put the holder upon inquiry, and that he could not recover though he had no knowledge of the fraud.

THE case is stated in the opinion of the Court.

CATRON, J. This is an action of assumpsit by the assignee of a note against the makers. The questions of law arising in this cause depend on the construction of a note of hand, in the following words: —

"SELMA, Dallas County, Alabama, March 1, 1836.

"Eleven months after date, we, Harris Brantly, Peyton S. Graves, and Hugh Ferguson, jointly and severally promise to pay Andrew Armstrong, cashier, or bearer, \$2000, value received, negotiable

and payable at the Branch Bank of the State of Alabama, at Mobile.

(Signed)

HARRIS BRANTLY,
PEYTON S. GRAVES,
HUGH FERGUSON.

“Credit : Diego M’Voy.

HARRIS BRANTLY,
PEYTON S. GRAVES,
HUGH FERGUSON.”

The note had on it the two indorsements of Diego M’Voy and William D. Primrose ; and that of Taulmin, Hazard, and Company was stricken out. On the face of the note there was, in pencil, the figures “169.”

The defendants, the three makers, introduced evidence to prove that the note, in its present form (except the indorsements), was sent by one of the makers to M’Voy, who was his factor in Mobile, to be offered for discount in the Branch Bank of the State, in that city, as an accommodation note ; the proceeds of which were to be forwarded to said maker. That the note was offered for discount and rejected. The factor then proposed to raise money on the note for his own use, without the knowledge of the makers, and intended to conceal the appropriation of the note from them. The first person to whom he offered to sell the note deemed the attempt a fraud, and refused to purchase. M’Voy then indorsed and transferred the note to Primrose for \$1200, communicating to him it had been offered for discount at the bank and rejected.

Taulmin, Hazard, and Company held a note for \$3250, on Black, indorsed by Vail and Dade, and by Primrose, and which was past due ; to discharge which, in part, Primrose transferred the note in controversy to Taulmin, Hazard, and Company ; and Taulmin, Hazard, and Company indorsed the same before its maturity, to the plaintiff, Fowler, and received credit on their account ; they being largely indebted to him at the time.

The leading feature in the cause, involving the principle on which it turns, is this : the note was in the form prescribed by the bank to those who desired accommodations at it ; which form was not in use before its adoption there. The memorandum on the left-hand side of the note, and signed by the drawers, was designed to show the officers of the bank to whose credit the money was to be placed,

should the note be discounted ; and by the usages of the bank, no other person than the one thus named could receive the money.

Primrose testified he knew from the pencil-mark on the face of the note, it had been offered for discount and refused, when he purchased it. The cashier proved the pencil-mark was made according to the usage of the bank on all notes offered for discount and refused.

To a part of the first instruction, that held if the plaintiff took the note in payment of a pre-existing debt, due to him from Taulmin, Hazard, and Company, then the jury ought to find for the defendants, exception is taken ; and the Court refused to instruct the jury, that, if the plaintiff took the note fairly in payment of a debt due to him, before its maturity, without notice of the purpose for which M'Voy had held it, then he was entitled to recover.

And also refused to instruct, if the jury believed plaintiff took the note *bona fide* in payment of a previous debt, that he had no notice of any fraud, and there were no circumstances to put him upon an inquiry into any fraud committed on the part of M'Voy, he was entitled to recover.

There were other instructions asked and refused ; but, as they are in effect the same as those recited, an answer to which will cover the whole case, they need not be further noticed.

The known customs of the bank, and its ordinary modes of transacting business, including the prescribed forms of notes offered for discount, were matters of proof, and entered into the contract ; and the parties to it must be understood as having governed themselves by such customs and modes of doing business ; and this whether they had actual knowledge of them, or not ; and it was especially the duty of all those dealing for the paper in question to ascertain them if unknown. Such is the established doctrine of this Court, as laid down in *Renner v. The Bank of Columbia*, 9 Wheat. 581 ; *Mills v. The Bank of the United States*, 11 Wheat. 431, and the *Bank of Washington v. Triplett and Neale*, 1 Peters, 32, 33.

The note sued on is peculiar in its form ; it was made for the purposes of discount, and only intended for negotiation at the bank, and not for circulation out of it. The pencil-mark on its face when sold, was common to all rejected paper, and was put there by the officers of the bank as evidence of the fact that it had been offered and rejected ; and those dealing for it, with the mark on its face, must be presumed to have had knowledge what it

imported ; as the slightest inquiry would have ascertained its meaning. These were the legal presumptions attached to the contract, when the plaintiff purchased it ; and the explanatory evidence to prove the customs of the bank, was introduced to enlighten the Court and jury in regard to the rules governing the transaction, and furnishing the law of the case ; and which the plaintiff, when he purchased the paper, is presumed to have known and understood, as the Court knew and understood it after it was proved on the trial.

This was the case, made up of law and fact, on which the Court was asked to charge the jury ; and not the abstract proposition whether, on a proper construction of the statutes of Alabama, negotiable paper, payable in bank, purchased *bona fide*, and without notice of an existing infirmity, but taken in discharge of a pre-existing debt, carried the infirmity with it into the hands of the purchaser ; for the reason that the mode of payment was not in the usual course of trade.

A note overdue, or bill dishonored, is a circumstance of suspicion, to put those dealing for it afterwards on their guard ; and in whose hands it is open to the same defences it was in the hands of the holder when it fell due. 13 Peters, 79. After maturity, such paper cannot be negotiable “ in the due course of trade ; ” although still assignable.

So the paper before us carried on its face circumstances of suspicion, so palpable as to put those dealing for it, before maturity, on their guard ; and as to require at their hands strict inquiry into the title of those through whose hands it had passed. Failing to be thus diligent, they must abide by the misfortune their negligence imposed, and stand in the condition of M’Voy.

As between him and the defendants, there was no contract or liability on their part ; nor as bearer of the note, could he lawfully pass it off in the due course of trade, so as to communicate a better title to another ; the face of the paper betraying its character and purposes, and M’Voy’s want of authority.

All the rulings of the Court below must be referred to this paper, and to the special case made by the proofs. Any instruction asked which cannot be given to the whole extent asked, may be simply refused ; or it may be modified at the discretion of the Court. No instruction was asked that could have been lawfully given ; to every one the Court could well say, and did in substance say, that

under no circumstances could a purchase of this note be made by the plaintiff, from Taulmin, Hazard, and Company, so as to exempt it in the hands of the assignee, from the infirmity it was subject to in the hands of M'Voy.

And in regard to the last part of the first instruction, where the jury is in substance told, that if they believed the note was taken in payment of a pre-existing debt, due to plaintiff, from Taulmin, Hazard, and Company, still, they should find for the defendants; the Court might have gone further, and instructed the jury, that neither could the plaintiff recover had the note been purchased *bona fide*, and without notice of the fraudulent conduct of M'Voy.

The judgment is, therefore, ordered to be affirmed.

The distinction between the class of cases to which the above decision belongs, and that to which *Goodman v. Simonds, infra*, belongs, is this: In the latter case the paper was valid, and in itself clear of all suspicion; while in the preceding case the paper bore upon its face the evidence of its defects. In *Goodman v. Simonds*, the bill or note could only be impeached by extraneous circumstances; in *Fowler v. Brantly* the paper itself was its own impeachment. See *Goodman v. Simonds, infra*.

TIMOTHY S. GOODMAN, Plaintiff in Error, v. JOHN SIMONDS.

(20 Howard, 343. Supreme Court of the United States, December, 1857.)

Bona fide holder's claim only to be repelled by bad faith. — In an action by the holder of a bill of exchange placed by the drawer in the hands of the holder as collateral security for his debt, the following instruction was given to the jury: "That if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect that the drawer had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts," the plaintiff could not recover. *Held*, that the instruction was erroneous, and that nothing short of bad faith in the holder would overcome his title; and the burden of proof is upon him who assails the title to show such bad faith.

THE case is stated in the opinion of the Court.

CLIFFORD, J. This was a writ of error to the Circuit Court of the United States for the district of Missouri.

Timothy S. Goodman, a citizen of the State of Ohio, complained

in the Court below of John Simonds, a citizen of the State of Missouri, in a plea of trespass on the case upon promises. The declaration was filed on the first day of March, 1854. It contained two counts; one upon a bill of exchange, and the other upon an account stated. At the April term following, the defendant appeared and pleaded the general issue, which was joined, and several special pleas in bar of the action. The special pleas were held bad on demurrer, and at the October term, 1855, the parties went to trial on the general issue. Robert M. Nesbit, a witness called for the plaintiff, testified that he was a notary public of the county of St. Louis; and that as such, on the fifteenth day of January, 1848, he presented the bill in suit for payment to John Simonds, the acceptor, who refused to pay it, and that he afterwards gave due notice of the presentment and refusal to both indorsers. And the witness further testified that he was well acquainted with the signatures of all the parties to the bill, except that of the drawer, and that they were genuine. Whereupon the plaintiff read in evidence the bill of exchange described in the first count of the declaration, together with the indorsements thereon, as they appear in the record. W. Nesbit & Co. were merely nominal holders of the bill, never having had any interest in it, and only indorsed it to the plaintiff for the greater convenience in bringing the suit. Evidence was then introduced on the part of the defendant, exhibiting substantially the following state of facts: On the twenty-first day of June, 1847, the defendant addressed a letter to Wallace Sigerson, who resided at Cincinnati, informing him that he wished to avail himself of banking facilities in that place to carry on certain business in which he and John Sigerson had determined to engage, and asking his assistance as a correspondent, to negotiate discounts, inclosing at the same time his letter of credit for ten thousand dollars, and two bills of exchange, each for the sum of five thousand dollars, and suggesting in the same letter that they should require some twenty to twenty-five thousand dollars during the next four or five months, in sums of about five thousand dollars, as the same could be used from time to time. In the same letter also he instructed his correspondent to negotiate five thousand dollars immediately, authorizing him to use for that purpose either the letter of credit or the bills of exchange. When those bills were transmitted to Cincinnati they were in all respects perfect bills of exchange, except that the name of the drawer was

wanting, and they were without date. They were both made payable to the order of John Sigerson, and by him indorsed in blank, and were accepted by the defendant. Soon after their receipt, Wallace Sigerson, as drawer, procured one of the bills to be discounted according to his instructions, and remitted the proceeds, or a part thereof, to the defendant; and it also appeared that, during that season, he procured other bills of the same kind to be discounted for the same parties, to the amount of twenty-five thousand dollars. The other bill forwarded at that time is the one now in suit. Wallace Sigerson had also large transactions of his own the same season, amounting to four hundred thousand dollars. Many of his own transactions were with his brother, John Sigerson, who was the payee and indorser of this bill, and was jointly engaged in the same business with the defendant. He and his brother interchanged accommodation paper, and some of their acceptances were regularly discounted in blank, and it did not appear that any complaint was made, either by the acceptor or indorser, that this bill had not been accounted for or returned. There were dealings, also, the same season, between T. S. Goodman & Co. and Wallace Sigerson. They made a settlement on the twelfth day of October, 1847, when it was ascertained that the amount due to T. S. Goodman & Co. was about five thousand six hundred dollars, arising principally from notes discounted, secured by bills of exchange as collaterals, on which nothing had been realized. At the settlement the debt was divided into two notes, one having sixty and the other seventy-five days to run; and Wallace Sigerson testified that he gave his two notes in payment of the debt, and left this bill as collateral security to the notes, fixing the dates so that the notes would mature twelve or fifteen days before the bill. Two drafts on Ravisess, Bullock, & Co., previously held as collaterals, were embraced in the settlement, and formed a part of the indebtedness for which the notes were given; and McDonald, who was the book-keeper of the plaintiff's firm, and a witness for the defendant, testified he knew of no other collateral security than this bill, which the firm held for those notes. It would seem, therefore, that all the prior collaterals were surrendered to the defendant at the settlement. There is some confusion, and perhaps uncertainty, in the evidence reported, respecting the history of the bill from the time it went into the possession of Wallace Sigerson till it was thus placed in the hands of T. S.

Goodman & Co., as collateral security to the above-mentioned notes. It may, however, be gathered from the testimony of Wallace Sigerson, that he first offered it for discount to the Ohio Life and Trust Company, and shortly afterward to the plaintiff, for the same purpose, and that the plaintiff declined to discount it, but soon after took it as collateral security for temporary loans. How long the bill remained in the possession of the plaintiff as collateral security for temporary loans does not appear, nor for whose benefit the money was obtained. When the settlement took place, Wallace Sigerson told the plaintiff that he had a right to use the bill, and the plaintiff agreed that it should not be sent to St. Louis for collection till after the maturity of the notes to which it was collateral. Nothing of the kind was agreed when it was left as collateral security for temporary loans. Wallace Sigerson became the drawer of this bill, as he had previously done with respect to the other, which was sent him at the same time, and filled up the date, but whether at the time of the settlement or previously, was not entirely certain. He failed in business in November, 1847, and on the twentieth day of the same month, T. S. Goodman & Co. addressed a letter to C. W. Clark and Brothers, inclosing this bill, and requesting them to pass it at the least rate, not exceeding twelve per cent interest, saying: "We do not indorse it, as we are selling it for another;" and when L. C. Clark, one of that firm, a few days afterward offered the bill for sale to the defendant, "he said it was a forgery of his name; that Wallace Sigerson had no authority to use it." At the trial, the Court, on the prayer of the plaintiff, instructed the jury to the effect that, if the plaintiff acquired the bill of Wallace Sigerson as collateral security without notice of his want of authority to transfer it, that the plaintiff was unaffected by such abuse of trust, and that the defendant was precluded from setting it up as a defence in this suit, to which no exceptions were taken. We pass over the first instruction given to the jury on the prayer of the defendant, for the same reason that it was not excepted to, and proceed to examine the second, as amended by the Court, which presents the principal subject of controversy at the present time. It was to the effect that, "if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that Wallace Sigerson had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary dili-

gence he could have ascertained these facts, then the jury will find for the defendant."

I. The general question which the bill of exceptions presents, arising upon that instruction, is certainly one of very considerable importance, especially to the mercantile community, as it affects the transfer and free circulation of bills of exchange and promissory notes, which, by virtue of their negotiable quality, constitute the principal medium for the transaction of their business affairs. There is, however, some reason to doubt whether the evidence at the trial furnished any proper basis for the application of the instruction in this case, even supposing the principle announced to be correct as an abstract proposition; and this gives rise to a preliminary question, which will be first considered, whether the instruction ought not to be regarded as objectionable on that account. When a prayer for instruction is presented to the Court, and there is no evidence in the case for the consideration of the jury, it ought always to be withheld; and, as a general rule, if it is given under such circumstances, it will be error in the Court, for the reason that its tendency may be and often is to mislead the jury, by withdrawing their attention from the legitimate points of inquiry involved in the issue. All that was shown at the trial, in addition to the description of the bill, was the refusal of the plaintiff to discount it when it was offered for that purpose, his possession and control of it shortly after as a pledge for temporary loans, and the subsequent transfer of the bill to him as collateral security at the settlement, together with the circumstances of that transaction and what appeared in the letter of T. S. Goodman & Co., transmitting the bill to St. Louis for sale. Other circumstances are adverted to in the printed argument for the defendant; but as they do not appear to be sustained by the evidence in the case, they are omitted. Nothing transpired when the bill was offered for discount more than what occurs on similar occasions in the daily transactions among business men. It was offered and declined, and that was the whole transaction so far as it was disclosed in the evidence. No reasons were assigned by the plaintiff for declining, and none were asked for by the holder who offered the bill. Mere speculative inferences are never allowable, and cannot be regarded as evidence. The refusal to discount the bill might have been for the reason supposed in the instruction; and so also it might have been for a very different reason, such as a

prior obligation to other customers, want of available funds, or from a desire for further information as to the pecuniary standing of the parties to this bill; and whether it was for any one of the reasons suggested or some other, in the absence of any explanation, was a mere naked conjecture. Another answer may also be given to this suggestion which is equally decisive, and that is the subsequent conduct of the plaintiff in taking the bill as a pledge for temporary loans, which seems to negative the supposition altogether that the previous refusal to discount it was on account of any suspicion he entertained, either as to the genuineness of the paper, or of the authority of the holder to pass it. Some time elapsed after the bill was offered for discount, before it was finally transferred to the plaintiff, and that fact undoubtedly was well known to the plaintiff at the time of the transfer; and so also was the more important one in this investigation, that during all that time the bill remained in the custody or under the control of Wallace Sigerson, as the ostensible owner, and that he claimed and exercised over it all the rights of a holder for value. If these circumstances are taken in connection with each other, as they unquestionably should be, there can be no doubt they were far better suited to inspire confidence in the title of the holder than to excite suspicion in regard to his authority to pass the bill; and if they had that effect, it was plainly the fault of the defendant in executing and forwarding the bill to his correspondent, and in intrusting it to his control, and suffering it to remain in his custody without inquiry or complaint. The want of date to the bill at the time it was offered for discount, under the circumstances disclosed in the evidence, was entirely an immaterial consideration. When the defendant sent the bill to Wallace Sigerson, indorsed in blank and without date, and intrusted it to his care and discretion to be used for his own benefit, he thereby empowered him to fill the blank as a necessary incident to the trust conferred, just as effectually as if the authority had been expressly delegated by the terms of the letter in which it was sent. Nor was it of any consequence that it was antedated, as compared with the time when it was passed to the plaintiff, inasmuch as it was filled up by his own correspondent before he parted with its possession and control, and was actually made to bear date subsequent to the time when it was received from the defendant. In filling it up he but carried into effect one of the purposes for which it had been forwarded, as is plainly in-

dictated from the general scope and design of the letter. He was authorized to use the bill to raise money for the benefit of the defendant; and, in order to use the bill for that purpose, it must have been expected that he would become the drawer, and fill up the date at his discretion. Independently, however, of the terms of the letter, it may be asserted as a general principle that, where a party to a negotiable bill of exchange or promissory note intrusts it to the custody of another, when it is without date, whether it be for the purpose to accommodate the person to whom it was intrusted or to be used for his own benefit, such bill or note carries on its face an implied authority to fill up the blank; and, as between such party to the bill or note and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such bill or note to his custody, and as acting under his authority, and with his approbation. *Mitchell v. Culver*, 7 Cow. 336, and note.

The general doctrine on this subject, and the reasons on which it is founded, are stated by *Shaw, C. J.*, in *Androscoggin Bank v. Kimball*, 10 Cush. 373, as follows: "The rule is very clear, that if one party, intending to accommodate another, signs his name to a blank paper, he authorizes the other to whom he delivers it, and for whose accommodation it was made, to fill up the blank; and the filling up, being done by his authority, is his act, and he is bound by it; and we concur in the principle, and think it applies with even more force when it was done for his own benefit, as in this case." *Violett v. Patton*, 5 Cranch, 142; *Russel v. Langstaffe*, 2 Doug. 514; *Collis v. Emett*, 1 H. Black. 313; *Montague v. Perkins*, 22 Eng. L. & Eq. 516.

The circumstances thus far considered we think afforded no ground of inference whatever to support the theory of fact assumed in the instruction. But it is more difficult to dispose of those that follow in the same way, on account of the extremely indefinite nature of the inquiry arising under the instruction. One man is more readily influenced to suspect fraud in matters of business than another, and the same individual may be differently impressed by similar transactions occurring at different times under precisely similar circumstances; so that in some cases, where the evidences to excite suspicion were slight, it might be impossible to determine whether they were or were not of a character to be regarded as tending to support an issue like the one presented under the first

branch of the instruction, without first ascertaining the general characteristics of the mind of the individual who was the subject of the inquiry, and his usual habit in conducting his business affairs. A striking illustration of the difficulty attending the investigation is to be found in the instruction itself, assuming for the present that it must be understood according to the usual import of the language employed. Under its first branch it was necessary, in order to relieve the defendant, that the jury should find that such facts and circumstances were known to the plaintiff as caused *him* to suspect the title or authority of the holder to transfer the bill. But the jury might come to the conclusion that the plaintiff was thoughtless, confiding, or inattentive on the occasion, and that he in fact took the bill without any such suspicion; and to guard against the effect of such a finding, the second branch of the instruction was framed, and under that it was of no consequence whether the plaintiff himself suspected the title of the holder or not, as the defendant was nevertheless to be fully exonerated if the jury found that such facts and circumstances were known to him as would have caused one of ordinary prudence to suspect, and by ordinary diligence he could have ascertained the true state of the title. Here was an attempt to prescribe a standard in the investigation, by which the degree of suspicion intended to be required to defeat the claim of the plaintiff could be ascertained and measured by the jury; but under the first branch of the instruction no such attempt was made, and no other criterion was furnished to guide the jury in their deliberations, than mere naked suspicion; and consequently, if the jury believed, from the evidence in the case, that the plaintiff at the time of the transfer suspected the title or authority of the holder to pass the bill, no matter how slight his suspicions were, they were directed to return their verdict for the defendant. With this explanation as to the nature of the present inquiry, we will proceed to notice the remaining circumstances relied on as evidence in the case to support the instruction. They consist of the knowledge that the plaintiff is supposed to have acquired at the settlement, that Wallace Sigerson was embarrassed in his business affairs, and of the subsequent conduct of his firm, in forwarding the bill to St. Louis before the maturity of the notes, and the remark in their letter that they did not indorse the bill, as they were selling it for another. These circumstances are consistent with

the proposition of fact assumed in the instruction; and though they are susceptible of an entirely different explanation, yet perhaps it would be going too far to say, as matter of law, that they afforded no ground of inference in the direction supposed by the defendant. We think, therefore, that the judgment ought not to be reversed on the ground that there was no evidence in the case to authorize the instruction. We say so, however, in reference to the peculiar issue arising under that instruction, and the form of the questions submitted to the jury, and not in respect to any different issue which may properly arise hereafter in cases of this description. There is a wide difference between suspicion and knowledge in respect to the subject-matter under consideration, and even as between the evidence of suspicion, and such as would show gross negligence on the part of a banker or business man when discounting or purchasing negotiable paper transferable by delivery. A person may often suspect in matters of business what in fact he does not believe, and experience teaches that he will sometimes suspect what he has no reason to believe, and that too when the evidences to excite suspicion are so slight that he himself would scorn to acknowledge them as the basis of his action in the premises. Evidence merely tending to show, as in this case, that a party, in acquiring a negotiable bill of exchange or promissory note, suspected the title of the holder at the time of the delivery, would clearly be insufficient to authorize the conclusion that he was guilty of gross negligence when the transfer was made, and it would hardly constitute an approach towards proof that he had knowledge that such holder, who was known to be dealing in such paper, and claimed the right to use it, was guilty of any breach of trust in passing it.

II. The more important question, whether the instruction was correct, remains to be considered; and in approaching that question it becomes necessary, in the first place, to ascertain what the instruction was, and to deduce from it the principle of commercial law which was applied to the case. It was somewhat peculiar in its language, and, in fact, contained two distinct propositions, differing essentially in certain aspects, and not entirely reconcilable with each other; and yet we cannot doubt that the Circuit Court, in giving the instruction to the jury, intended to apply the doctrine to the case, that the title of the holder of a negotiable bill of exchange acquired before maturity is not protected against prior

equities of the antecedent parties to the bill, where it was taken without inquiry, and under circumstances which ought to have excited the suspicions of a prudent and careful man. Such was certainly the general scope of the instruction, especially its second proposition; and such, it may be presumed, was the general principle intended to be embodied in the questions submitted to the jury. They have been so treated here in the oral argument for the plaintiff, and were treated in the same way in the printed argument filed for the defendant. Whether either or both of the questions, in the form in which they were submitted, were objectionable as involving a departure from the doctrine intended to be applied, it will not become necessary to inquire. One thing is certain, — if the general principle cannot be sustained, there is nothing in the features of the departure from it, or the particular phraseology of the questions submitted, to benefit the defendant. Undoubtedly the same general idea pervaded the instruction, though the questions were submitted to the jury in different forms, in order to meet the different aspects of the evidence in the case. It was to the effect, that if the plaintiff had acquired the bill under the circumstances described in either branch of the instruction, then he had acted without due caution, and was not entitled to recover. All the other grounds of defence had been provided for in other prayers for instruction. This one was obviously prepared to raise the single question, whether the plaintiff had acted with due caution in acquiring the bill, and consequently assumed all the other requisites of a good title in favor of the plaintiff. The only question, therefore, arising under the instruction, is, whether the rule of commercial law applied to the case was correct. Bills of exchange are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. They may be transferred by indorsement; or when indorsed in blank, or made payable to bearer, they are transferable by mere delivery. The law encourages their use as a safe and convenient medium for the settlement of balances among mercantile men; and any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy. Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there

should be, as far as practicable, uniformity of decision throughout the world. A well-defined and correct exposition of the rights of a *bona fide* holder of a negotiable instrument was given by this Court in *Swift v. Tyson*, 16 Peters, 1,¹ as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion, as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This Court then said, and we now repeat, that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. That question was not one of new impression at the date of that decision, nor was it so regarded either by the Court or the learned judge who gave the opinion; on the contrary, it was declared to be a doctrine so long and so well established, and so essential to the security of negotiable paper, that it was laid up among the fundamentals of the law, and required no authority or reasoning to be brought out in its support; and the opinion on that point was fully approved by every member of the Court, and we see no reason to qualify or change it in any respect. Such being the settled law in this Court, it would seem to follow as a necessary consequence from the proposition as stated, that if a bill of exchange indorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no knowledge of these facts, for a valuable consideration, and in the usual course of business, his title would be good, and that he would be entitled to recover the amount. The law was thus framed, and has been so administered, in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value; and this principle is so comprehensive in respect to bills of exchange and promissory notes, which pass by delivery, that the title and possession are considered as one and inseparable, and in the absence of any explanation the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is

¹ *Ante*, 186.

on the party attempting to impeach the title. These principles are certainly in accordance with the general current of authorities, and are believed to correspond with the general understanding of those engaged in mercantile pursuits. The word notice, as used by this Court on the occasion referred to, we think must be understood in the same sense as knowledge, and indeed that is one of its usual and appropriate significations. Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether a party who took it had notice or not, is in general a question of construction, and must be determined by the Court as matter of law ; and so it was understood by this Court in *Andrews v. Pond et al.*, 13 Peters, 65, where it is said that “a person who takes a bill which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it.” And the same doctrine was adopted and enforced in *Fowler v. Brantly*, 14 Peters, 318,¹ where, in speaking of a promissory note, so marked as to show for whose benefit it was to be discounted, this Court held that all those dealing in paper “with such marks on its face, must be presumed to have *knowledge* of what it imported.” See *Brown v. Davies*, 3 T. R. 80.

Other cases of like character, where the defect appears on the face of the instrument, are referred to in the printed argument for the defendant as affording a support to the instruction under consideration ; but it is so obvious that they can have no such tendency, that we forbear to pursue the subject. *Ayer v. Hutchins*, 4 Mass. 370 ; *Wiggin v. Bush*, 12 Johns. 306 ; *Cone v. Baldwin*, 12 Pick. 545 ; *Brown v. Taber*, 5 Wend. 566.

But it is a very different matter when it is proposed to impeach the title of a holder for value, by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Nothing less than proof of knowledge of such facts and circumstances can meet the exigencies of such a defence ; else the proposition as

¹ *Ante*, 235.

stated is not true, that a party who acquires commercial paper in the usual course of business, for value and without notice of any defect in the title, may hold it free of all equities between the antecedent parties to the instrument. Admit the proposition, and the conclusion follows. And the question whether the party had such knowledge or not, is a question of fact for the jury, and, like other disputed questions of *scienter*, must be submitted to their determination, under the instructions of the Court; and the proper inquiry is, did the party, seeking to enforce the payment, have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument? and if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen. Every one must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron *Parke*, in *May v. Chapman*, 16 Mees. & W. 355, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith. Mere want of care and caution, which was the criterion assumed in the instruction, falls so far below the true standard required by law, which is knowledge of the facts and circumstances that impeach the title, that we feel indisposed to pursue the general discussion, and proceed to confirm the views we have advanced as to what the law is, by referring to some of the decisions in the English courts, from which, as an important source of commercial law, most of our own rules upon the subject have been derived.

The leading case, among the more modern decisions in that country, is that of *Goodman v. Harvey*, 4 Adol. & Ellis, 870. That was a case in bank, on a rule *nisi*, which was made absolute. Lord *Deuman*, in delivering judgment, said: "We are all of opinion that gross negligence *only* would not be a sufficient answer, where a party has given consideration for the bill; gross negligence may be evidence of *mala fides*, but it is not the same thing. Where the bill has passed to the plaintiff without any proof of *bad faith* in him, there is no objection to his title." That case was followed by *Uther v. Rich*, 10 Adol. & Ellis, 784, which

was also argued before a full Court, and the same learned judge held that the only proper mode of implicating the plaintiff in the alleged fraud by pleading was to aver that *he had notice of it*, leaving the circumstances by which that notice was to be proved, directly or indirectly, to be established in evidence; and he further held, that an averment that the plaintiff was not a *bona fide* holder was not equivalent. According to the rule laid down in *Goodman v. Harvey*, which indubitably is the settled law in all the English courts, proof that the plaintiff had been guilty of gross negligence in acquiring the bill, ought not to defeat his right to recover; and if not, it serves to exemplify the magnitude of the error assumed in the instruction, that any facts and circumstances which would excite the suspicion of a careful and prudent man were sufficient to destroy the title. It is clear that one or the other of these rules must be incorrect; both cannot be upheld. Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; and if such neglect would not defeat the right to recover—and clearly it would not, unless attended by bad faith—it cannot require any further reasoning to demonstrate that the instruction was erroneous. Several cases have been decided in England upon the same subject, and to the same effect, and the rule laid down in *Goodman v. Harvey* is now adopted and sanctioned by the most approved elementary treatises upon commercial law. *Raphael v. The Bank of England*, 33 Eng. L. & Eq. 276; *Palmer v. Richards*, 1 Eng. L. & Eq. 529; *Arbounin v. Anderson*, 1 Adol. & Ellis, n. s. 498; *May v. Chapman*, 16 Mees. & W. 355; *Chitty, Bills*, 12th ed. 257; *Story, Bills*, 3d ed. § 416; *Byles, Bills*, 4th Am. ed. 121–126; *Smith's Mer. Law*, ed. 1857, 255; *Edwards, Bills*, 309; 1 *Saund. Pl. & Ev.* 591; *Wheeler v. Guild*, 20 Pick. 545; *Brush v. Scribner*, 11 Conn. 368; *Backhouse v. Harrison*, 5 Barn. & Adol. 1098; *Gwynn v. Lee*, 9 Gill, 138.

These cases, beyond controversy, confirm the rule laid down by this Court in *Swift v. Tyson*, and they also furnish the fullest evidence, by their harmony each with the other, as well as by their entire consistency with the principal case, that the law has been uniform since the decision in *Goodman v. Harvey*, which was decided in 1836; and we think it will appear, upon an examination, that it has always been the same, at least from a very early period in the history of English jurisprudence down to the present time,

except for an interval of about twelve years, while the doctrine prevailed which is now invoked in support of the instruction in this case. That doctrine had its origin in *Gill v. Cubitt*, 3 Barn. & C. 466, and it was followed by the other cases referred to in the printed argument for defendant. It was decided in 1824, and it is true, as the cases cited abundantly show, that it was *acquiesced in* for a time, as a correct exposition of the commercial law upon the subject under consideration. At the same time, it is proper to remark, that there is not wanting respectable authority that it had been much disapproved of before it was directly questioned; and it is certain, that nearly two years before it was finally overruled, *Parker, B.*, in delivering judgment in *Foster v. Pearson*, regarded it as mere "*dicta*, rather than the decision of the judges of the King's Bench." See *Raphael v. The Bank of England*, [*supra*] per Cresswell. The reasons assigned for that departure from the long-established rule upon the subject are as remarkable and unsatisfactory as the change was sudden and radical, and yet their particular examination at this time is unnecessary. It is a sufficient answer to the case to say, that it has been distinctly overruled in the tribunal where it was decided, and has not been considered an authority in that Court for more than twenty years. The doctrine, says Mr. Chitty in his *Treatise on Bills*, is now completely exploded, and the old rule of law that the holder of bills of exchange, indorsed in blank and transferable by delivery, can give a title which he does not possess, to a person taking them *bona fide* for value, is again re-established in its fullest extent. It was not, however, accomplished at a single blow, but the error, so to speak, was literally broken up and destroyed by instalments. The foundation of the superstructure was severely shaken in *Crook v. Jadis*, 5 Barn. & Adol. 909, when the full bench first came to the conclusion that want of due care and caution was insufficient to constitute a defence, and that gross negligence, *at least*, must be shown, to defeat a recovery. But it was left to the case of *Goodman v. Harvey* to announce a complete correction of the error, when Lord *Denman* declared, we have shaken off the last remnant of the contrary doctrine.

A brief reference to some of the earlier cases will be sufficient to show that the decision in *Gill v. Cubitt*, was a departure from the well-known and long-established rule upon the subject under consideration. One of the earliest cases usually referred to is that

of Hinton's case, reported in 2 Show. 247. It was an action on the case against the drawer upon a bill of exchange payable to bearer. The Court ruled that the holder must entitle himself to it on a consideration; "for if he come to be bearer by *casually* or *knavery*, he shall not have the benefit of it;" and so in Anonymous, 1 Salk. 126, where a bank-note payable to A, or bearer, was lost, and found by a stranger, and by him transferred to C, for value. Holt, C. J., held that "A might have trover against the stranger, for he had no title to it, but not against C, by reason of the course of trade, which creates a property in the bearer." And again in Miller v. Race, 1 Burr. 452, 462, where an inn-keeper received a bank-note from his lodger in the course of business, and paid the balance, Lord Mansfield held he might retain it, as he came by it *fairly* and *bona fide*, and for value, and *without knowledge* that it had been stolen. And on a second occasion, in Grant v. Vaughan, 3 Burr. 1516, where a bill payable to bearer was lost, and the finder passed it to the plaintiff, the same Court left it to the jury to find whether he came to the possession *fairly* and *bona fide*. But a still stronger case is that of Peacock v. Rhodes, 2 Doug. 632, where a bill of exchange, indorsed in blank, was stolen and passed to the plaintiff by a man not known. It was argued for the defendant, that a holder should not *in prudence* take a bill unless he knew the person. Lord Mansfield answered, "that the law is well settled, that a holder coming *fairly* by a bill has nothing to do with the transaction between the original parties. . . . The question of *mala fides* was for the consideration of the jury." And lastly, and to the same effect, is Lawson v. Weston *et al.*, 4 Esp. 56, where a bill of exchange for £500 was lost or stolen, and was discounted by plaintiff for a stranger. It was insisted for the defendant, that "a banker or any other person should not discount a bill for one unknown, without *using diligence* to inquire into the circumstances." Lord Kenyon replied, that "to adopt the principles of the defence would be to paralyze the circulation of all the paper in the country, and with it all its commerce; that the circumstance of the bill having been lost, might have been material, *if they could bring knowledge of that fact home to the plaintiff*." The cases cited, commencing in 1694 and ending in 1801, are sufficient to show what the state of the law was in 1824, when Gill v. Cubitt was decided, especially as the judges of the King's Bench, in giving their opinions on that occasion, did not

pretend that there were any later decisions in which it had been modified.

III. But, assuming that the instruction was erroneous, it is still insisted by the course of the argument for the defendant, that it was immaterial; and the argument proceeds upon the ground that the case, as made in the bill of exceptions, shows that the plaintiff was not the holder of the bill for a valuable consideration, in the usual course of business. On the contrary, it is insisted that he held it merely as a collateral security for a pre-existing debt, without any present consideration at the time of the transfer, and that a party who takes negotiable paper under such circumstances does not acquire it in the usual course of business, and consequently takes it subject to prior equities. Whatever may be our impressions in a case like the one supposed, we think the question does not arise in the present record, assuming the facts to be as they are exhibited in the bill of exceptions; and the answer to the argument will be based entirely upon that assumption, without prejudice to what may hereafter appear. When the settlement was made, the new notes were given in payment of the prior indebtedness and the collaterals previously held were surrendered to the defendant, and the time of payment was extended and definitively fixed by the terms of the notes, showing an agreement to give time for the payment of a debt already overdue, and a forbearance to enforce remedies for its recovery; and the implication is very strong that the delay secured by the arrangement constituted the principal inducement to the transfer of the bill. Such a suspension of an existing demand is frequently of the utmost importance to a debtor, and it constitutes one of the oldest titles of the law under the head of forbearance, and has always been considered a sufficient and valid consideration. *Elting v. Vanderlyn*, 4 Johns. 437; *Morton v. Burn*, 7 Adol. & Ellis, 19; *Baker v. Walker*, 14 Mees. & W. 465; *Jennison v. Stafford*, 1 Cush. 168; *Walton v. Mascall*, 13 Mees. & W. 453; Com. Dig. action assumpsit, B. 1; *Wheeler v. Slocum*, 16 Pick. 62; Story, Promissory Notes, § 186, and cases cited. The surrender of other instruments, although held as collateral security, is also a good consideration; and this, as well as the former proposition, is now generally admitted, and is not open to dispute. *Dupeau v. Waddington*, 6 Whar. 220; *Hornblower v. Proud*, 2 Barn. & Ald. 327; *Rideout v. Bristow*, 1 Crompt. & J. 231; *Bank of Salina v. Babcock*, 21 Wend. 499; *Youngs v. Lee*, 2 Ker. 551. It seems now to be

agreed that, if there was a present consideration at the time of the transfer, independent of the previous indebtedness, a party acquiring a negotiable instrument before its maturity as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt for which it is held as collateral. *White v. Springfield Bank*, 3 Sandf. S. C. 222; *New York M. Iron Works v. Smith*, 4 Duer, 362. And the better opinion seems to be in respect to parol contracts, as a general rule, that there is but one measure of the sufficiency of a consideration, and, consequently, whatever would have given validity to the bill as between the original parties, is sufficient to uphold a transfer like the one in this case. We are not aware that the principle as thus limited and qualified, is now the subject of serious dispute anywhere, and that is amply sufficient for the decision of this cause. Whether the same conclusion ought to follow where the transfer was without any other consideration than what flows from the nature of the contract at the time of the delivery, and such as may be inferred from the relation of debtor and creditor in respect to the pre-existing debt, is still the subject of earnest discussion, and has given rise to no small diversity of judicial decision. It seems it is regarded as sufficient in England, according to a recent case. *Poirier v. Morris*, 20 Eng. L. & Eq. 103; Byles, Bills, pp. 96, 127. A contrary rule prevails in New York, as appears by several decisions. *Coddington v. Bay*, 20 Johns. 637; *Stalker v. McDonald*, 6 Hill, 93; and also in Tennessee, *Napier v. Elam*, 5 Yerg. 108. It is settled that it is a sufficient consideration in Massachusetts, Vermont, and New Jersey, and such was the opinion of the late Justice *Story*, as appears from his remarks in *Swift v. Tyson*, and in his valuable treatise on Bills of Exchange. *Stoddard v. Kimball*, 6 Cush. 469; *Story*, Bills, § 192; *Chicopee Bank v. Chapin*, 8 Met. 40; *Blanchard v. Stevens*, 3 Cush. 162; *Atkinson v. Brooks*, 26 V. 569; *Allaire v. Hartshorne*, 1 Zab. 665. We think, however, that the point does not arise in this case, for the reasons before stated, and consequently, forbear to express any opinion upon the subject. The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings, with directions to issue a new *venire*.

The doctrine of this case was again maintained in the Supreme Court of the United States, in *Bank of Pittsburgh v. Neal*, 22 How. 96, and in *Murray v. Lardner*, 2 Wall. 110; and in the latter, the doctrine of *Gill v. Cubitt* is again emphatically denied. *Murray v. Lardner* was a case of stolen coupon bonds, payable to bearer. It was held that the rules pertaining to ordinary commercial paper applied to these; and that a purchaser, in good faith, is unaffected by want of title in the vendor; the burden of proof resting upon the party who assails the possession. Mr. Justice *Swayne*, in delivering the opinion of the Court, after stating the points decided in the principal case, proceeds to say: "Such is the settled law of this Court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive in themselves, are admissible in evidence; and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder.

"The rule laid down in the class of cases of which *Gill v. Cubitt* is the antetype, is hard to comprehend, and difficult to apply. One innocent holder may be more or less suspicious under similar circumstances at one time than at another; and the same remark applies to prudent men. One prudent man may also suspect where another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs. The rule established by the other line of decisions has the advantage of greater clearness and directness. A careful judge may readily so submit a case under it to the jury that they can hardly fail to reach the right conclusion."

Upon the important subject of coupon bonds, he says: "We are well aware of the importance of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep-rooted and wide-branching. It ramifies in every direction, and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression or give an easy triumph to fraud, they should not forget the considerations of equal importance which lie in the other direction. In *Miller v. Race* [1 Burr. 452], Lord *Mansfield* placed his judgment mainly on the ground that there was no difference in principle between bank-notes and money. In *Grant v. Vaughan* [3 Burr. 1516], he held that there was no distinction between bank-notes and any other commercial paper. At that early period his far-reaching sagacity saw the importance and the bearings of the subject."

The doctrine of *Gill v. Cubitt* was however adopted in the courts of several States before the overruling case of *Goodman v. Harvey* had become generally known in this country. See *Sandford v. Norton*, 14 Vt. 228; *Hall v. Hale*, 8 Conn. 336; *Cone v. Baldwin*, 12 Pick. 545; *Boyd v. Melvor*, 11 Ala. 822; *Nicholson v. Patton*, 13 La. 213; *Smith v. Mechanics' Bank*, 6 La. An. 640, *Slidell, J.*, dissenting. *Goodman v. Harvey* is adopted in *Worcester Bank v. Dorchester and M. Bank*, 10 Cush. 488. But see *Merriam v. Granite Bank*, 8 Gray, 254, 259.

It is also the law in Georgia, Maryland, and Texas. *Matthews v. Poythress*, 4 Ga. 287, 306; *Ellicott v. Martin*, 6 Md. 509; *Grenaux v. Wheeler*, 6 Texas, 515. *Goodman v. Harvey* was directly denied in *Pringle v. Phillips*, 5 Sandf. 157; but this case was overruled in the Court of Appeals in 1866, and *Goodman v. Harvey* adopted. *Magee v. Badger*, 34 N. Y. (7 Tiff.) 247. See also *Belmont Branch Bank v. Hoge*, 35 N. Y. (8 Tiff.) 65, reaffirming *Magee v. Badger*, and stating that *Gill v. Cubitt* has been repeatedly overruled, both in England and in America. *Goodman v. Harvey* is cited by all the text-writers as declaring the soundest law. See authorities cited by Mr. Justice *Clifford*, *supra*. Also *Story*, *Promissory Notes*, § 197 and note; *Id.* *Bills of Exchange*, §§ 194, 416; 3 Kent, Com. 81, 82, note. With so many strong authorities in favor of the rule in the principal case, there can be little doubt that the early cases which follow *Gill v. Cubitt* will eventually be overruled.

It follows from the rule in the principal case that mere proof of want of consideration will not throw the burden upon the plaintiff of showing that he is a *bona fide* holder for value, and without notice. And so are the cases since *Goodman v. Harvey*. See *Whittaker v. Edmunds*, 1 Moody & R. 366; *Mills v. Barber*, 1 Mees. & W. 425; *Low v. Chifney*, 1 Bing. N. C. 267; *Smith v. Braine*, 16 Q. B. 244, 253; *Knight v. Pugh*, 4 Watts & S. 445; *Fletcher v. Gushee*, 32 Maine, 587; *Ellicott v. Martin*, 6 Md. 509; *Ross v. Bedell*, 5 Duer, 462.

GEORGE FISHER v. DANIEL LELAND, JR., *et al.*

(4 Cushing, 456. Supreme Court of Massachusetts, October, 1849.)

Indorsee affected with notice.—One who has taken commercial paper by indorsement before it is due, with notice of fraud in its inception, is subject to the same defenses, in an action against the maker, that could be raised against the payee to whom the fraud had attached. And the maker, against such indorsee, can give in evidence the fraudulent acts of the payee, and the admissions and confessions of the latter, while he was the holder of the note.

THE case is stated in the opinion of the Court.

SHAW, C. J. The single question is, whether, after the defendant had proved that the plaintiff took the note in question by indorsement before it was due, but with notice that the promisors intended to defend on the ground that the note was obtained by the payee of the maker by fraud, they could give in evidence the fraudulent acts of the payee; and whether they could give in evidence the admissions and confessions of the payee, whilst he was the holder of the note and before the indorsement, to prove

such fraud. The distinction appears to be this: that when an indorsee takes a bill or note, by indorsement, before it is due, and without notice of fraud or other matter of defence, he takes it on an independent title by the indorsement, and will not be affected by any payment, set-off, fraudulent consideration, or other matter of defence, which the acceptor or promisor might have had against any previous holder or prior party. He is not in privity with such prior party, does not claim under him, and is not bound by the acts, frauds, or admissions of any such prior party. And in order to give the highest credit and the freest circulation to negotiable securities, transferred by indorsement, in favor of commerce, this principle is held with great firmness and strictness; and by a series of recent decisions, the rule upon the subject, instead of being relaxed, is held with greater strictness than formerly. *O'Keefe v. Dunn*, 6 Taunt. 305; *Dunn v. O'Keefe*, 5 Maule & S. 282; *Gill v. Cubitt*, 3 Barn. & C. 466; *Goodman v. Harvey*, 4 Adol. & Ellis, 870; *Foster v. Pearson*, 1 Crompt., Mees. & R. 849; *Arbounin v. Anderson*, 1 Adol. & Ellis, n. s. 498.

But where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, Why is it in circulation; why is it not paid? Here is something wrong. Therefore, although it does not give the indorser notice of any specific matter of defence, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry: he takes only such title as the indorser himself has, and subject to any defence which would be made, if the suit were brought by the indorser. The note does not cease to be negotiable; the indorsee takes a title, and may sue, but he is so far in privity with his indorser that he takes only his title; and if the defendant could make any defence against a suit brought by such indorser, he can make it against the indorsee.

This rule is settled in the case of a suit by an indorsee taking the note overdue, by a series of authorities, which show not only that such defence may be made, but that it may be proved by the same evidence, by which it might have been proved if the indorser were plaintiff: to wit, the admissions of such indorser, made whilst he was the holder. *Sylvester v. Crapo*, 15 Pick. 92; *Barough v. White*, 4 Barn. & C. 325; *Phillips v. Cole*, 10 Adol. & Ellis, 106; *Beauchamp v. Parry*, 1 Barn. & Ad. 89. These authorities might be multiplied almost indefinitely.

But the indorsement of a note overdue is only one mode of giving the indorser notice that there is some matter of defence relied on ; if he has express notice, he may take it and may sue the note, but he takes subject to such defence as the defendant might make against the indorser.

The case in an early volume of the reports of this Court, *Wilson v. Holmes*, 5 Mass. 543, was one where the plaintiff had notice in the form of the indorsement, which was : " Pay T. W., or order, for our use, value received in account." See *Humphries v. Blight*, 4 Dall. 370 ; *White v. Kibling*, 11 Johns. 128. In the early leading case on this subject, *Brown v. Davies*, 3 T. R. 80, 83, Lord *Kenyon*, who was not disposed to go quite the length of the doctrine held by Mr. Justice *Buller*, says, " I agree, &c., if it appears on the face of the note to have been dishonored, or if knowledge can be brought home to the indorsee that it had been so." In a note to the same case, in *Taylor v. Mather*, where the defence was that the note was obtained by fraud, and where it was negotiated when overdue, *Buller*, J., says : " Such a note is negotiable, but if there are any circumstances of fraud in the transaction, I have always left it to the jury, on the slightest evidence, to presume that the indorsee was acquainted with the fraud."

It seems, therefore, that it is not that the indorsement of a note after it is due is, *per se*, such as to render the note void, or to defeat the right of the plaintiff ; but if there are anterior circumstances, such as fraud in obtaining the note, the fact that the indorsee takes it when overdue, is a circumstance of suspicion, which should put him on inquiry, and leads to a presumption that he knew, or by inquiry might know, of such fraud, and is deemed constructive notice of it. It identifies the title of the indorsee with that of the indorser. This being so, actual notice of such fraud, brought home to the knowledge of the indorsee at the time he took the note by indorsement, is equally availing to prove that he is not a *bona fide* holder, and to give the defendant the same ground of defence as he would have had against the indorser.

Exceptions overruled.

See *Goodman v. Simonds*, *ante*, 240, and note, 257, 258.

WILLIAM HASCALL and ROLAND H. GERRY v. JOEL
WHITMORE.

(19 Maine, 102. Supreme Court, April, 1841.)

Indorsee with notice claiming under holder without. — One who purchases commercial paper for value, with notice of defect in its inception, from a *bona fide* holder without notice, stands upon the rights of the latter, and may recover the amount of the paper.

THE case is stated in the opinion of the Court.

SHEPLEY, J. The plaintiffs are joint owners of a negotiable promissory note purchased before it became payable. One of them is a holder for value without notice; the other with notice, but deriving his title through others who were *bona fide* holders without notice. As between the original parties the note may be regarded as made without consideration. Andrews, who was the first and an innocent indorsee for value, did not indorse it, when he disposed of it, and he was properly admitted as a witness. *Whitaker v. Brown*, 8 Wend. 490. He could have collected it, for the want of consideration could not be set up against him. A knowledge of the facts acquired afterward would not affect his rights. He had not only a legal right to hold and collect it, but to negotiate it. And the maker could not impair that right by giving notice that it was made without consideration. Nor would he be injured by a transfer to one having a full knowledge of the facts; for his position would not be more unfavorable than before.

Bayley states, that the want of consideration cannot be insisted upon "if the plaintiff, or any intermediate party between him and the defendant, took the bill or note *bona fide* and upon a valuable consideration." Bayley, 550. ed. by Phillips & Sewall.

The case of *Thomas v. Newton*, 2 Car. & P. 606, was assumpsit on a bill drawn by Wilson on the defendant and accepted, and by him indorsed to Dandridge and by him to the plaintiff. The defence was a want of consideration. Lord *Tenterden* says, "if the defendant shows, that there was originally no consideration for the bill, that throws it on the plaintiff to show that he gave value for it, or that value was given for it by Dandridge; for if either the plaintiff or Dandridge gave value for it, the plaintiff may recover; otherwise the defendant is entitled to recover."¹

In *Solomons v. The Bank of England*, 13 East, 134, 135, note (b),

¹ This doctrine has been exploded. See *Goodman v. Simonds*, *ante* 249, and note 257, 258; also *ante*, note to *Swift v. Tyson*, p. 186.

it appeared, that the bank-note had been obtained fraudulently from Batson & Co., who informed the bank of it. The plaintiff as holder claimed payment of the bank, and it was refused. He had received the bill of Hendricks & Co.; and it did not appear, that he paid value for it before notice. Lord *Kenyon* says, "upon this evidence I think Solomons must be considered to be in the same situation as Hendricks & Co." But as it did not appear, that they were holders for value without notice, the plaintiff did not recover.

In *Smith v. Hiscock*, 14 Maine, 449, where a negotiable promissory note had been indorsed *bona fide* and for value before it was payable, the Chief Justice says, "the want of consideration is not an available defence against a subsequent holder, to whom it may have been passed after it was due. The promise is good to the first indorsee free from that objection; and the power of transferring it to others with the same immunity is incident to the legal right which he had acquired in the instrument. By the first negotiation the want of consideration between the original parties ceases as a valid ground of defence."

If the relations between the maker and holder only were to be considered, the want of consideration would be a good defence against one, who did not purchase for value, or who did so after it was once due. And yet it has been decided, that one so situated may avoid that defence by showing, that it could not have been interposed against a prior holder. The same principle appears to be equally applicable to a holder who has purchased with notice. If the relations between himself and the maker only were to be considered he could not recover. But purchasing of one who had no notice he must be considered to be in the same situation and as entitled to the same protection.

Defendant defaulted and judgment for amount due on the note.

The doctrine of this case is well settled. See *Boyd v. McCann*, 10 Md. 118; *Prentice v. Zane*, 2 Grat. 262; *Watson v. Flanagan*, 14 Texas, 354; *Howell v. Crane*, 12 La. An. 126; *Woodworth v. Huntoon*, 40 Ill. 131; *Bassett v. Avery*, 15 Ohio State, 299; *Lickbarrow v. Mason*, 2 T. R. 63, 71; *Robinson v. Reynolds*, 2 Q. B. 196, 211; *Story, Promissory Notes*, § 191, where the rule is thus stated: "The partial or total failure of consideration, or even fraud between the antecedent parties, will be no defence or bar to the title of a *bona fide* holder of a note for a valuable consideration, at or before it becomes due, without notice of any infirmity therein. The same rule will apply, although the present holder has such notice, if he yet derives a title . . . from a prior *bona fide* holder for value. This doctrine, in both its parts, is indispensable to the security and circulation of negotiable instruments; and it is founded in the most comprehensive and liberal principles of public policy."

GRANT AND CARY v. ELLICOTT.

(7 Wendell, 227. Supreme Court of New York, May, 1831.)

Accommodation paper. Holder with notice. — In an action by an indorsee of a bill of exchange against the acceptor it is no defence that the bill was accepted for the accommodation of the drawer, and that the indorsee had knowledge of the fact when he took the bill.

THE case is stated in the opinion of the Court.

SAVAGE, C. J. The defendant says he ought not to pay the bill, because no consideration passed between him and Graham, and this was known to the plaintiffs: that is, the defendant accepted the bill for the accommodation of the drawer, which the plaintiffs knew. This is no defence; it was so decided in *Smith v. Knox*, 3 Esp. 46. Lord *Eldon* there held that where a bill is given for the accommodation of the drawer or payee, and is sent into the world, it is no answer to an action upon it against the acceptor, that he accepted it for the accommodation of the drawer, and that the fact was known to the holder; in such case the holder, if he gave a *bona fide* consideration for it, is entitled to recover, though he had full knowledge of the transaction. In that case the plaintiff produced no proof but of handwriting of the parties to the bill.

The case of *Charles v. Marsden*, 1 Taunt. 224, was very like this case. The action was brought by the indorsee against the acceptor. The defendant pleaded that it was accepted for the accommodation of the drawer, and without any consideration, and that this was known to the plaintiffs when they took the bill, after it was due. *Mansfield*, C. J., says: "There is no allegation of fraud in this plea, nor any allegation that the plaintiff did not give a valuable consideration for this bill: it must therefore be presumed that he did." *Lawrence*, Justice, says: "In the present case, it is to be supposed that the party (drawer) persuades a friend to accept a bill from him because he cannot lend him money, would there be any objection, if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due? Then what is the objection to his furnishing it after it is due? For there is no reason why a bill may not be

negotiated after it is due, unless there was an agreement for the purpose of restraining it."

I know of no decision supporting this plea, and it would be extremely prejudicial to commercial paper if it could be supported. The acceptor in a bill is considered in the same light as an indorser of a promissory note; and it is well known that much of the paper discounted in our banks is accommodation paper, and it never has been supposed that the indorser in such case is not liable.

Judgment for plaintiffs on demurrer, with leave to amend, on payment of costs.

This case enunciates an elementary principle, and does not require the citation of authorities to sustain it. There are, however, some peculiar doctrines growing out of the law of accommodation paper; these are illustrated in the following cases. See also note to *Swift v. Tyson*, *ante*, p. 186.

It is no defence that the paper was overdue when the indorsee took it with knowledge that it was accommodation paper. *Thompson v. Shepherd*, 12 Met. 311.

SMALL *et al.* v. SMITH.

(1 Denio, 583. Supreme Court of New York, October, 1845.)

Fraudulent diversion. — One who purchases accommodation paper with knowledge that the terms and conditions on which the accommodation was given have been violated is not a *bona fide* holder as against the party who lent his name for accommodation.

THE case is stated in the opinion of the Court.

BEARDSLEY, J. If the evidence given on the trial was true, and that was for the jury to determine, it is perfectly clear that the note was delivered to the plaintiffs in violation of the agreement upon which it had been indorsed by the defendant. The plaintiffs therefore were not entitled to recover, unless they received it *bona fide* and upon a valuable consideration. Both were necessary. It must have been received in good faith, without notice of the arrangement on which the indorsement had been made, and the transfer must have been upon what the law regards as a valuable

consideration. These principles admit of no dispute ; and although upon some points of commercial law in close proximity to those I have stated, discordant opinions may be found, *Stalker v. McDonald*, 6 Hill, 93, *Swift v. Tyson*, 16 Peters, 1, there is entire harmony as to those I have mentioned.

The judge charged that if the plaintiffs received the note in payment and satisfaction of a debt due to them from Hulburt, the maker of the note, that was a sufficient consideration for its transfer, and they thereby became purchasers for value. This, as a legal proposition, is not questioned ; but the bill of exceptions fails to show any evidence to which this principle could be applied. There was no proof which tended to show that the note had been transferred in extinguishment of the debt of Hulburt. The judge, therefore, in my view of the case, erred in submitting that question to the jury.

But I shall not dwell on this point, for the case may be disposed of on the question of good faith.

It appears by the testimony of Hulburt, that he was indebted to the plaintiffs in a sum exceeding the amount of this note, and that Small, one of the plaintiffs, came to Vienna, where Hulburt resided, to secure payment of said debt. Small proposed to Hulburt to give a note at one year with security, and the defendant, who lived in another county, was spoken of for that purpose. Small said he would take the defendant as surety, and it was arranged that while Small was absent (as he was going West for a few days), Hulburt should go to the defendant's residence in order to obtain him as such surety. Pursuant to this arrangement Hulburt went to see the defendant, and told him what he wanted. At first the defendant refused to indorse, but it was finally agreed between them that he would indorse the note upon condition that one Austin, who then held a note given by the defendant, should deposit the same with a third person, there to remain until the defendant should be discharged from said indorsement. The note in question was accordingly signed by Hulburt and indorsed by the defendant, but it was not to be transferred to Small, or used in any manner, until the one held by Austin had been deposited under said arrangement. Hulburt returned with the note to Vienna, where Austin lived, and told him of the arrangement under which the indorsement had been made. Austin declined to comply with that arrangement, but Hulburt, as he states, left the note in suit on Austin's table, and

did not see it again until Small had returned to Vienna. Hulburt first saw Small after his return at Austin's office, where, on arriving at the office, according to the testimony of Hulburt, Small said to him: "We have fixed that matter, and Mr. Austin has let me have the note." The witness then inquired of Austin, in Small's presence, in what manner the note had been turned out, and whether the arrangement of the defendant had been complied with, to which Austin made no answer, but Small said he had prevailed on Mr. Austin to indorse the note and he had got it. This, according to the witness Hulburt, was all which passed at that time. Another witness (Paul), who was present, said the remark of Hulburt to Austin was, that he supposed he had not turned out the note without complying with the request of Mr. Smith, the defendant, to which Austin made no answer, but Small said he had prevailed on Mr. Austin to indorse the note and had released Mr. Smith.

It is not material which of these witnesses was correct as to the form of the remarks made at that time. Both come to the same result; for what was said, according to the statement of either witness, was full notice to Small that the indorsement had been procured upon some arrangement or condition which had not been complied with. Here, then, Small had actual notice that the indorsement was conditional; and if the note was subsequently transferred to him, he would necessarily take it subject to that condition. When this notice was given, the note was in Small's hands. He had received it, as he said, of Mr. Austin. But it cannot be pretended he had received it of Austin upon any consideration moving between them. Indeed, the first remark of Small to Hulburt, and all that was said on that occasion, goes to show that whatever might have been done by Austin had been done for Hulburt and not for himself, and in furtherance of the negotiation which had been commenced between Hulburt and Small. It is not shown that Austin had authority from Hulburt to transfer this note to Small on any terms, although it may be inferred that he was authorized to do so, on complying with the condition upon which the defendant's indorsement had been made. Small did not set up that he had received the note as the property of Austin, and the whole transaction shows he did not. He could not, therefore, upon the facts as disclosed by the witnesses, pretend that he had acquired title to the note in any manner before he was apprised by Hulburt

that the indorsement was made on a condition which had not been performed. It is more a matter of inference than of any thing like direct proof, that Hulburt at any time assented to the transfer of the note to Small; but if he did so, after notice to Small of the condition on which the indorsement had been made, it is plain that the plaintiffs ought not to recover, as the condition has never been performed. If the plaintiffs claim as purchasers of the note from Austin, they are met by two objections: first, Small, one of the plaintiffs, was aware that the note belonged to Hulburt and not to Austin; and, secondly, it is not shown that the plaintiffs paid or advanced any thing to Austin, or that any consideration passed between them for the transfer of the note. And as to Hulburt, if he assented to the transfer of the note to Small, it was after explicit notice that the indorsement was conditional, as is proved by the testimony of both Paul and Hulburt. Had the case been put to the jury upon the point of notice, with suitable explanations, there is no doubt what the verdict should and would have been, unless these witnesses were wholly discredited. I think the case was not so submitted to the jury, and that it should be sent back for a new trial.

New trial granted.

See preceeding and following cases.

MOHAWK BANK v. COREY and LIVERMORE, Impleaded.

(1 Hill, 513. Supreme Court of New York, July, 1841.)

Accommodation paper. Diversion. — Where it does not appear that the accommodation party had any interest in the manner in which his paper was to be applied, it is immaterial that it was not used according to agreement.

THE case is stated in the opinion of the Court.

BRONSON, J. The indorsers, Corey and Livermore, lent their names to Borst, the maker, for the purpose of giving him credit, and he was at liberty to negotiate the note in any way he thought proper. Borst says, he got them to indorse it for the purpose of

enabling him to get it discounted at the Albany City Bank, to raise money to buy barley. But it does not appear that the indorsers had any interest in having it discounted by the Albany City Bank, or that the use which Borst should make of the money was in any way important to them. They merely asked Borst what he was going to do with the money, and he told them he was going to purchase barley with it. If the note had been made for the purpose of taking up another note in the Albany City Bank, to which the indorsers were parties, it would have presented a different question. But here, although the indorsers had the curiosity to inquire what use the maker designed to make of the note, they had no interest in the question; and, so far as appears, they would just as readily have lent their names if the maker had told them he wished to take up his notes in the plaintiffs' bank,—the use which he afterwards made of the paper. Within the proper legal sense of the term, there has been no diversion of the note from the purpose for which it was made and indorsed. The indorsers lent their names for the purpose of giving the maker credit generally, and without any concern with the use which should be made of that credit.

But if there had been a diversion of the note from its proper use, the plaintiffs would still be entitled to recover. They not only took the note in *payment* of two other notes which they then held against Borst indorsed by Voorhees, but they *gave up* those securities. They also gave up, of course, the suit which had been commenced and was then pending on the two notes. This is a stronger case than that of the *Bank of Salina v. Babcock*, 21 Wend. 499. There have been several other decisions to the same effect, which are not yet published.¹ It is not denied that the plaintiffs are *bona fide* holders of the paper, and it is equally clear that they paid a valuable consideration for it.

New trial denied.

The rule is thus stated in *Wardell v. Howell*, 9 Wend. 170, per *Sutherland, J.*: "Where a note has effected the substantial purpose for which it was designed by the parties, an accommodation indorser cannot object that it was not effected in the precise manner contemplated at the time of its creation. . . . But where a note has been diverted from its original destination, and fraudulently put in circulation by the maker or his agent, the holder cannot recover upon it against an accommodation indorser, without showing that he received it in good faith, in the ordinary course of trade, and paid for it a valuable consideration."

¹ *Bank of Sandusky v. Scoville*, 24 Wend. 115.

CHARLES STODDARD *et al.* v. JOHN KIMBALL.

(6 Cushing, 469. Supreme Court of Massachusetts, October, 1850.)

Misapplication. — In an action by the indorsee against the indorser who had indorsed the paper for the maker's accommodation, the indorser cannot raise the defence that the note was misapplied by the maker, without showing that the plaintiff had knowledge of the misapplication.

Amount of recovery. — If accommodation paper has been taken to secure a pre-existing debt of a less amount than that expressed on the face of the paper, the holder can recover against the accommodation indorser only the amount of the debt, if he (the holder) is not liable to any third person for any surplus.

THE case is stated in the opinion of the Court.

SHAW, C. J. This was a suit brought by the plaintiff as indorsee of a promissory note, against the defendant as indorser. The defence relied on was, that the defendant indorsed the note, at the request and for the accommodation of the maker, for a special purpose, that of taking up another note, on which he was indorser, and that it was not so applied, but was negotiated to the plaintiffs, as collateral security for a debt due to them. The defendant also contended, that the plaintiffs, at the time of taking the note, had notice of the misapplication of the same, as above stated; but this fact was left to the jury, who found that the plaintiffs had no such notice.

It further appeared that some payments had been made by the maker of the note to the plaintiffs, towards the discharge of the debt, for securing which to the plaintiffs this note was received, and also that the maker being insolvent, the plaintiffs proved this debt against his estate, and received a dividend.

The defendant contended that if liable at all, he was liable only for the balance of the debt due the plaintiffs, if less than the amount of the note, and the judge, who tried the cause, so ruled, subject to the opinion of the whole Court, and in case they should be of opinion that the plaintiffs are entitled to recover the whole amount, the verdict is to be altered and amended accordingly.

We think the direction was right. An indorser of an accommodation note, passed by indorsement to a *bona fide* holder, in due course of business, is effectually bound to all the liability, to which,

by law, the indorser of a business note is liable. He stipulates to take on himself the qualified obligation of one, who indorses and puts in circulation a note taken by himself for value in the course of business.

If indeed an accommodation note is obtained from another, by fraud, deception, or false practices, or having been obtained for one purpose, is fraudulently misapplied to another, and it is negotiated to one, even for value, with full notice of the fraud in obtaining or misusing it, he cannot recover; he is not a *bona fide* holder; an attempt to recover it would make him a partaker in the fraud; and the same would be true of a business note.

In the present case, it appearing that the note was negotiated to the plaintiffs before it was due, for a valuable consideration, and the jury having found that they took it without notice of the misapplication by the maker, it is clear that they have a right to recover; and the only remaining question is, for what amount they may recover. In general, the holder of an indorsed note will be entitled to recover the whole amount of the face of the note, because the presumption of fact, in the absence of counter proof, is, that he gave the full value for it, or that he took it from some other holder for value, to collect the amount, receive a certain part to his own use, and account to the party from whom he took it for the surplus. Having taken it to secure a pre-existing debt, of a less amount, he is a holder for value in his own right, only to the amount of the debt due him. If, therefore, it appears in proof, that the plaintiff is not accountable to any third person for any surplus, then there is no reason why he should recover any more than the balance of the debt, for which he is a *bona fide* holder for value. Here, it appears that the plaintiff received this note of the maker, for whose accommodation the defendant indorsed it. It being obvious that the plaintiff can recover nothing as trustee for the party from whom he received it, he is liable over to nobody for the surplus, and therefore can have judgment only for the amount due to himself, for his own use and in his own right, which is so much of the note as may be necessary to satisfy the balance of the debt, for the security of which he received it.

Judgment on the verdict for the plaintiff for the smaller sum.

See *Allaire v. Hartshorne*, 1 Zab. 665, holding that, if the paper is invalid between the original parties for want of consideration, the holder can recover only the amount which he has actually advanced; citing *Edwards v. Jones*, 7

Car. & P. 633; s. c., 2 Mees. & W. 414; Robins v. Maidstone, 4 Adol. & Ellis (N. S.), 811; Chitty, Bills (8th ed.), 81; Sedgwick, Damages, 241. This doctrine is also sustained by the following authorities: Chicopee Bank v. Chapin, 8 Met. 40; Hilton v. Smith, 5 Gray, 400; Holeman v. Hobson, 8 Humph. 127; Williams v. Smith, 2 Hill, 301; Valette v. Mason, 1 Smith, Ind. 89; Wiffin v. Roberts, 1 Esp. 261; Jones v. Hibbert, 2 Stark. 304. See also Bond v. Fitzpatrick, 4 Gray, 89.

JAMES BAXTER v. WILLIAM LITTLE.
THE SAME v. JOSEPH HARRIS, JR.

(6 Metcalf, 7. Supreme Court of Massachusetts, March, 1843.)

Paper overdue. Set-off.—When the first indorsee of a promissory note negotiates it after it is dishonored, and the second indorsee brings an action thereon against the maker or first indorser, the defendant cannot set off any claim which he has against the first indorsee, except such as existed at the time of the transfer of the note to the plaintiff, although he had no notice of such transfer when he acquired his claim against the first indorsee.

THE *first* of these actions was by the indorsee against the maker of a promissory note for \$330, dated March 1, 1837, payable to Joseph Harris, Jr., in four months, and by him indorsed. The action was commenced October 4, 1839.

At the trial before the Chief Justice, the signatures of the maker and indorser were admitted by the defendant, and he relied upon a set-off of notes against the Franklin Bank, upon the ground that the note in suit was held by that bank, after it was due, and that he had a right to make the same defence against the plaintiff, as if the action were brought by the bank.

In order to present the question of law, it was mutually conceded, that the note was discounted by the Franklin Bank, in the due course of business; that it was held by the bank, when it became due; that afterwards, and after the bank had stopped payment, in pursuance of a vote of the directors to pay the debts of the bank in such securities as they had, the note in question, on the twentieth of December, 1837, was delivered to the plaintiff, or to the person under whom the plaintiff claims title, in exchange for bills of said bank, at par, which bills were then at a discount in the market: That before this action was brought—upon notice

of the plaintiffs' attorneys that they had such a note, and demanded payment thereof, but without notice to the defendant that the note had been transferred by the bank, — the defendant tendered to said attorneys, in satisfaction of the note, bills of the Franklin Bank, which they declined to accept; that the defendant has ever since had said bills, and has filed them in offset in this action, and now relies upon that tender and set-off.

The *second* of these actions was by the indorsee against the indorser of the same note, and all the facts stated in the previous case were agreed to in this. The defendant further, in this case, relied upon a balance due to him from the Franklin Bank, by way of set-off to the note. And it was further agreed by the parties, that on the fifth of June, 1838, there was due to the defendant, on the books of said bank, a balance of \$293.63, and that he had no notice of the transfer of the note to the plaintiff, until this suit was commenced; that within a month or two after the twentieth of December, 1837, when the note was passed out of the bank, notice was given to the defendant by the cashier, that it was so passed out; that the balance above mentioned, due to the defendant, on the fifth of June, 1839, arose from post notes deposited on that day, except \$12.88, which previously stood to his credit; and that the deposit then made cancelled all demands which the bank had against him, and left the above balance.

It was agreed in each case, that judgment should be entered for the plaintiff, if in the opinion of the Court he was entitled to recover; otherwise, that the plaintiff should become nonsuit.

SHAW, C. J. When a negotiable note is indorsed and transferred after it is due, and the defendant relies upon matter of set-off which he may have against the promisee, he can avail himself only of such matter of defence as existed between himself and the promisee, at the time of the actual indorsement and transfer of the note to the holder. A note does not cease to be negotiable, because it is overdue. The promisee, by his indorsement, may still give a good title to the indorsee. Notes or other matters of set-off, acquired by the defendant against the promisee, after such transfer, cannot be given in evidence in defence to such note, although the maker had no notice of such transfer, at the time of acquiring his demand against the promisee. Having made his promise negotiable, he is liable to any *bona fide* holder and actual indorsee; and

therefore, even after the note has become due, in making payments to the original promisee, or in further dealings by which he gives him a credit, he has no right to presume, without proof, that the promisee is still the holder of the note. Besides, in case of payment of a negotiable note, or of a credit which the maker intends shall operate by way of payment, he has a right to have his note given up, if paid in full, or to see the payment indorsed, if partial. Should he insist on this right, in the case proposed, he would at once perceive that the person to whom he is making payment or giving credit, is no longer the holder of the note. And this appears to us to be the true distinction between the indorsement of a note overdue, and the assignment of a chose in action. In the latter case, notice of the assignment must be given by the assignee to the debtor, to prevent him from making payment to the assignor. Without such notice, he has no reason to presume that the original creditor is not still his creditor; and payment to him is according to his contract and in the due and ordinary course of business. The assignee takes an equitable interest only, which must be enforced in the name of the assignor; and, until notice, he has no equity against the debtor, which can be recognized and protected by a court of law or equity. The indorsee of a note overdue takes a legal title; but he takes it with notice on its face that it is discredited, and therefore subject to all payments and offsets in the nature of payment. The ground is, that by this fact he is put upon inquiry, and therefore he shall be bound by all existing facts, of which inquiry and true information would apprise him; but these could only apprise him of demands then acquired by the maker against the payee.

We are aware that in the marginal note to *Sargent v. Southgate*, 5 Pick. 312, which is the leading case on this subject, it is stated, that "in an action by the indorsee against the maker of a negotiable note indorsed when overdue, the defendant may file in set-off a negotiable note made to him by the payee *before he had notice* that the note in suit was assigned." And the point is so stated in *Minot's Digest*, 640. No such decision was called for in that case, because all the demands, relied upon by way of set-off, were acquired by the defendant, whilst the original payee was holder of the note. But further; on a careful examination of the opinion, we think it will not be found that there is any such *dictum* in regard to notice. The inadvertence, in extracting the

marginal note from the case, probably arose from the very obvious analogy between the case of the indorsement of a note overdue, and the assignment of a chose in action, especially as there was nothing in the facts or the argument to call for a distinction between the two cases. The opinion of the Court in that case, therefore, is not an authority opposed to the ground of decision adopted in this, namely, that this right of set-off must be confined to those demands against the payee or prior holder, which accrued to the defendant, whilst such payee or prior holder was the actual holder of the note, and will not extend to demands which accrued afterwards, although no notice of the indorsement was given to the debtor.

The defendant Little, the maker of the note now in suit, not having shown that he held the bills of the Franklin Bank at the time that his note was transferred to the plaintiff, he cannot set them off in this suit. In a case in New York, it was held that bills of a bank, held by the defendant when his note became due, could not be set off in an action brought on the note by receivers appointed previously. *Haxtun v. Bishop*, 3 Wend. 13.

The English rule, in allowing set-off in an action upon a note, is somewhat more limited than our own, confining such defence to equities arising out of the same note, or transactions connected with it. *Burrough v. Moss*, 10 Barn. & C. 558. Here, it has been held, that an independent demand may be set off, where in other respects the party is entitled to go into that defence. *Sargent v. Southgate*, 5 Pick. 312; *Ranger v. Cary*, 1 Met. 369, 375.

Since the decision in *Sargent v. Southgate*, the principle decided by it has been confirmed, and the whole subject of set-off placed, by the Rev. Sts. c. 96, upon grounds more distinct and satisfactory than it was under the former statutes.

The principles already stated apply *a fortiori* to the case of Harris, the defendant in the second action, who was indorser of the same note. The note was transferred to the plaintiff by the Franklin Bank, in December, 1837, soon after which, the defendant had actual notice of it from the cashier; and it is found that the deposit to the credit of the defendant, upon which he relies by way of set-off, was made, and the credit obtained, in June, 1838. It is stated indeed, that prior to that time there was a small balance to his credit, on deposit of \$12.88, but there were other demands of the bank, at that time, against the defendant, exceeding that

deposit; so that the whole of the defendant's demand against the bank, offered in set-off, accrued subsequently to the transfer of the note, which is now in suit, to the plaintiff.

Judgment, in both cases, for the plaintiff.

This question is discussed and decided in *Britton v. Bishop*, 11 Vt. 70. The facts in the case will sufficiently appear in the opinion of the Court by

REDFIELD, J. The only question presented for the consideration of this Court, arises upon the third and fourth pleas of the defendant. These pleas are substantially the same, and amount to nothing more than an alleged agreement on the part of Ballou, the original payee of the note in suit, to apply a lesser note, given by him to the firm of Buskirk and Prondit, and by them indorsed to the defendants, upon the note now sued. It is alleged that this agreement was made on the twenty-ninth of August, 1837, and that at that time, and for a long time thereafter, to wit, twenty days, Ballou was the owner of the note now sued in the name of plaintiff. The latter note fell due on the first day of September, 1837, and the above allegation is by no means equivalent to an allegation that Ballou negotiated the note to the plaintiff when the same was overdue. For the allegation by way of a *continendo*, being under the *ridelicet*, is immaterial, and the whole allegation is satisfied by proof that the payee of the note retained it till the twenty-ninth day of August. It is to be taken, then, that the note was negotiated while it was still current, and the signers cannot, as against this plaintiff, avail themselves of the defence attempted, without showing notice of such agreement brought home to the plaintiff at the time of receiving the note. The pleas in controversy contain no such allegation, and are therefore bad.

But, as the counsel seem to understand the fact in the case to be that the note was negotiated to the plaintiff when overdue, and desire a decision upon the merits of the question thus presented, the Court have passed upon it.

There can be no doubt that, at common law, the holder of a negotiable bill or note who receives it from the payee after it falls due, takes it subject to all defences which attach to the note or bill in the hands of the indorser.

It was first doubted whether a bill or note, overdue, could be so negotiated as to enable the indorsee to sue it in his own name. But, upon the opinion of merchants, the Court of King's Bench decided such action would lie. *Mitford v. Wallicot*, 1 Salk. 129. But in *Brown v. Davies*, 3 T. R. 80, and *Tayler v. Mather*, ib. 84, it is expressly decided that the indorsee, in such case, takes the bill or note subject to all defences. In the former case some stress is laid upon the fact that the bill had been noted for non-payment, but in the latter case that was considered of no importance. This is the well-settled doctrine of the common law. In the case of *Sargent v. Southgate*, 5 Pick. 312, it was holden that the maker of a note or bill negotiated when overdue, and sued in the name of the indorsee, might in his defence plead any matter in set-off, which he could have pleaded if the suit had been in the name of the payee. This was allowed by an equitable construction of the Massachusetts statute of set-offs. No English decision has gone that length. The case of *Burrough v. Moss*, decided in the King's Bench, 1830, reported in 10 Barn. & C. 558, and in 21 Eng. C. L. 128, puts this question upon the true ground. The Court there held that the

indorsee of an overdue promissory note is liable to all equities *arising out of the note transaction itself*, and to the application of demands due the maker from the payee, when there was an agreement, either express or implied, to that effect. That rule would clearly enable the defendants in the present case to avail themselves of the note mentioned in the third and fourth pleas, for the purpose of reducing damages, even after judgment or default.

The recent American cases hold substantially the same doctrine. *Barlow v. Scott*, 12 Iowa, 63; 10 id. 208. All defences as between the original parties, so far as the note is concerned, are equally available against the indorsee who receives the paper when overdue. *Bates v. Kemp*, 12 Iowa, 99. But a set-off against the holder of paper taken before maturity is not an admissible defence, even when known to the purchaser at the time of the indorsement to him. *Barker v. Valentine*, 10 Gray, 341; *Flint v. Flint*, 6 Allen, 34. But an agreement to accept payment by application upon other outstanding notes due the maker from the payee will be a valid defence in such case. *Staley v. Mathers*, id. 937. So where a promissory note, negotiable but not indorsed, was given for stock subscribed in a railway corporation, and at the time of its execution and being secured by mortgage, the company gave the maker a counter contract, guaranteeing him against loss upon the stock, such counter contract will be a defence against a bill for foreclosure of the mortgage, the stock having become worthless. *Peck v. Bligh*, 37 Ill. 317.

An interesting and important question arose in *Oulds v. Harrison*, 28 Eng. L. & Eq. 524. It was there held that the right of an indorsee of an overdue bill of exchange to sue the acceptor is not defeated by the existence of a debt due from the drawer to the acceptor, and notice by the latter to the drawer, before indorsement, of his election to set off the amount against the bill; nor is the indorsee of such overdue bill of exchange affected by the existence of a right of set-off as between the acceptor and the drawer, although the bill was indorsed without value and for the purpose of defeating the set-off. *Parke, B.*, said: "This plea, though inaccurately stated, we think amounts to an averment that both the indorser and indorsee knew that there was a debt due, and that the defendant would probably set it off, if the action were brought by the indorser against the defendant, knowing there would probably be a set-off (because it was not quite certain that the debt would still remain due); but knowing there would probably be a set-off, they fraudulently, so far as it was a fraud in law, and no further, agreed that the bill should be indorsed; and it was therefore indorsed without value to the plaintiff. . . The holder's power to circulate it is not restrained simply by the existence, at the time, of a debt of equal value, and his circulating it is no infringement of any existing right of the defendant. . . Does it become a fraud in defeating the title, if he actually intends to do that which, under the circumstances, would be the necessary result of this act? and would it become so, if he communicates that intention to the indorsee, and the latter agrees to assist him? This we think is no fraud, and does not avoid the transaction."

This doctrine proceeds on the ground that set-off, strictly so called, is not such an equity as can be interposed against the indorsee of commercial paper, whether taken before or after maturity. *Whitehead v. Walker*, 10 Mees. & W. 696; *Way v. Lamb*, 15 Iowa, 79; *Arnot v. Woodburn*, 35 Mo. 99.

WILLIAM KNIGHTS v. SAMUEL PUTNAM.

(3 Pickering, 184. Supreme Court of Massachusetts, September, 1825.)

Usury. When maker can set up this defence. — Commercial paper which is valid in its inception cannot be tainted with usury afterwards, except as between the immediate parties; and, therefore, the maker of a note, valid when executed, cannot raise the defence against an indorsee that the latter purchased the note of the payee at a usurious rate of interest.

ASSUMPSIT upon a promissory note made by the defendant, payable to W. Putnam or order, and by him indorsed to the plaintiff. Plea, the general issue.

At the trial before *Putnam, J.*, the defendant offered the indorser as a witness, to prove that the consideration of the indorsement was usurious; but he was rejected as incompetent, on the authority of *Manning v. Wheatland*, 10 Mass. 502.

The indorser had released to the defendant all his claims upon the note, and the defendant offered to prove by him that the note was pledged to the plaintiff as collateral security for a debt much less than the amount of it, contending that the plaintiff ought not to recover more than the amount of such debt. This evidence was considered as irrelevant, and was rejected.

A verdict was returned for the plaintiff, but if either of these determinations was incorrect, a new trial was to be granted.

WILDE, J. As to the question of usury, the case of *Manning v. Wheatland*¹ is directly in point. But the authority of that case has been questioned, and the objection to the doctrine, as it was there laid down, is entitled to great consideration.

The witness was held to be incompetent, not because he was interested, but on the ground of legal policy, which will not permit one who has transferred a negotiable security as valid, to invalidate it by his testimony.² But in that case, as in this, there was no illegality in the original contract, and no usury except in the transfer, in which the plaintiff himself was the guilty party. No deception therefore was practised on him. The note was a valid

¹ 10 Mass. 502.

² This subject is considered under EVIDENCE *post*.

contract; precisely what he supposed it to be at the time of the transfer.

But notwithstanding these objections, we are of opinion that the case of *Manning v. Wheatland* was rightly decided. For if the witness was competent, we consider the point to which he was called to testify as immaterial, and that consequently his testimony was properly excluded. We are aware there are conflicting opinions and contradicting decisions on this point, but after examining all the cases, we are satisfied that the defendant cannot avail himself of the defence of usury, and that a note, valid in its inception, may be recovered against the maker by an indorsee, although discounted by him at a rate exceeding legal interest.

It is a well-established principle that, if a note or security is valid when made, no usurious transaction afterwards between the parties or privies will affect its validity. *Ferrall v. Shaen*, 1 Saund. 295, Williams's note.

But it is objected that, as the transfer is usurious, the plaintiff's title fails, although the original contract remains good, and that he cannot derive title from an illegal transaction in which he was a guilty party. This objection would have weight if a usurious contract were *malum in se* or merely void. But it has been frequently held that a contract contaminated with usury is only voidable by the party injured or those claiming under him.

Now it is manifest that the maker of a note is not affected by a usurious agreement between the indorser and indorsee. He is liable on his contract, and it is immaterial to him whether the action be brought in the name of the indorser or in that of the indorsee. But I hold further, that the transfer of a note on a usurious consideration is neither void nor voidable. So far as the indorsement operates as the transfer of the note it is an executed contract, and the statute against usury is not applicable. It only applies to the implied promise or guaranty of the indorser, which being an executory contract may be avoided. But in no case can an executed contract be set aside on the plea of usury. It is not, however, necessary to insist on this distinction for the purpose of sustaining the present verdict. It is sufficient for this purpose, that the transfer is voidable only, and that it is not competent for the defendant, he not being a party to the transfer, to avoid it. The note being free from usury between the immediate parties to it, no after transaction with another person can, as respects those persons, invalidate it.

In New York, this principle is fully established by repeated decisions. The cases of *Bush v. Livingston*, 2 Caines's Cas. in Err. 66, and *Braman v. Hess*, 13 Johns. 52, and *Munn v. Commission Co.* 15 Johns. 44, are directly in point. The only case which has been decided on a contrary doctrine is that of *Lloyd v. Keach*, 2 Conn. 175. It is somewhat remarkable that in this case and in the case of *Munn v. Commission Co.* it is said the point under consideration was too clear to be questioned, although the two decisions are directly contradictory. The cases referred to by *Gould, J.*, as establishing the principle laid down in the case of *Lloyd v. Keach*, do not appear to me at all decisive. It is true, in those cases the law seems to be taken for granted as it is laid down by the learned judge in the case of *Lloyd v. Keach*. But he does not appear to have taken into consideration an important distinction in relation to these cases between notes or bills given on a valuable consideration and in the usual course of business, and accommodation notes or bills, made for the purpose of raising money, and not existing as valid contracts before they are discounted. The distinction is noticed and the law correctly stated by *Spencer, J.*, in the case of *Munn v. Commission Co.* He says: "It is clear that, if a bill or note be made for the purpose of raising money upon it, and it is discounted at a higher premium than the legal rate of interest, and where none of the parties whose names are on it can, as between themselves, maintain a suit on the bill when it becomes mature, provided it had not been discounted; that then such discounting of the bill would be usurious, and the bill would be void." The reason of the distinction is obvious. In the case supposed, the bill or note is mere waste paper before it is discounted: it is then that it first exists as a contract, and if tainted with usury it is voidable even in the hands of a *bona fide* holder. The case of *Jones v. Brooke*, 4 Taunt. 464, and the case of *Churchill v. Suter*, cited by *Gould, J.*, fall within this class of cases, and whether the other cases referred to were business notes or bills, or were made for the purpose of raising money, does not appear. Besides, these are *nisi prius* cases, and not at all decisive, nor can opinions incidentally expressed, and in support of which no reasons are given, be entitled to much weight of authority.

In the case of *Parr v. Eliason*, 1 East, 92, it was decided that a bill free from usury in its concoction, may be sold at a discount greater than the legal rate of interest, without avoiding the bill in

the hands of a *bona fide* holder. That was an action of trover, and it seems to be implied that, if it had been brought against the immediate indorsee, who was a party to the usurious transfer, it might have been maintained. But this is decided only by inference, and it was a point not involved in the decision of that case. But if the inference be admitted to be just, it does not follow that the maker of the bill can take advantage of the usury. If the transfer was voidable only, and Lord *Kenyon* clearly so considers it, for he likens it to a sale which is fraudulent against creditors, I see no legal reason why the maker of the note should be allowed to avoid it. If, however, the transfer is merely void, as *Gould, J.*, contends, then the case of *Parr v. Eliason* cannot be supported, for the *bona fide* holder in that case had no right to the bill. The transfer being void is a mere nullity, and it was immaterial whether the holder was or was not a party to the usurious transfer. This is the necessary legal consequence of considering the transfer as absolutely void; it is opposed to the current of the English authorities, and cannot be maintained either on principle or authority.

Judgment according to verdict.

A very full citation of authorities upon the points discussed in this case will be found in Perkins's edition of 3 Pickering.

HOLMES *et al.* v. WILLIAMS.

(10 Paige, 326. Court of Chancery of New York, 1843.)

Usury. — Where the holder and apparent owner of negotiable securities sells them at a discount, to a *bona fide* purchaser, who has no knowledge of the purpose for which such securities were made, the holder representing such securities to belong to himself, and to be business paper, the transaction is not usurious, as between the vendor and purchaser, though the representations of the vendor were false, the paper having been made to be sold at usurious discount in the market.

THE case is stated in the opinion of the Court.

GRIDLEY, V. C. The two first-named complainants constituted a mercantile firm in Utica, and were indebted to the defendant in a large sum of money. In the month of December last, S. Holmes,

one of the said firm, had in his hands a draft for \$2500 drawn upon the house of Morgan, Butler, & Co., of New York, by Ford and Smith, D. Vanderbilt, and F. C. Chapman, and indorsed in blank by L. Harvey, which draft at the time had never been accepted or negotiated, but was accommodation paper, belonging to the drawers, made and indorsed to raise money on, for their benefit, and placed in the hands of Holmes for that purpose alone. This draft Holmes negotiated, sold, and transferred by indorsement to the defendant, at a sum considerably below the amount due by its terms, and applying a portion of the consideration upon an existing demand of the defendant, and receiving the remainder in cash; Holmes representing to Williams at the time that the draft was business paper, and was the property of himself or himself and partners. In January following, the drawers applied to Holmes for the re-delivery of the draft; whereupon he applied to the defendant to take up the draft, which was effected under the following agreement: That the two Holmeses, with Kellogg as surety, should give the defendant their note, due on May 4th, 1839, for the amount due on the draft, and that a suit should be commenced against the Holmeses, upon which they should give a cognovit, upon which judgment should be entered and execution issued and levied on the property of the two Holmeses, returnable at the next term thereafter. The bill prays that the defendant may be perpetually enjoined from prosecuting the judgment execution, and that the same may be decreed to be satisfied of record, by the said defendant; and that he also may be decreed to deliver up the note to be cancelled.

The first question material to be decided is whether the purchase of the draft was usurious so that it was a void security in the defendant's hands. Were this a new question of construction to be settled under the statute, I confess I should think it was not. There is a good legal reason why a security, actually tainted with an original act of usury, should be held void in the hand of a *bona fide* and innocent holder. For the statute has declared it so in terms, and in all such cases as of notes given in violation of the statute against gaming, horse-racing, &c. Courts have uniformly held the securities void not merely against the payees and holders, with notice, but against holders receiving them for value, and before maturity and without notice. But to hold a security purchased as this draft was, tainted with usury and void in the hands of the purchaser, the purchase must be decreed, *pro hac vice*, a loan, — a

mere contract of borrowing and lending. It is true that a contract of purchase in words is very properly held to be in construction of law a contract of loan, when such a device is resorted to to cover a transaction which is really a loan. But how is such a transaction to be regarded as a loan upon principle when the purchase is *bona fide*? Suppose the contract to be written out, describing A, the owner of a bond made by B, and setting out the sale of it for a sum less than the amount due on its face, and providing that a portion should be applied on a demand due from the seller to the purchaser and the residue paid in money; and suppose, farther, that on the part of the purchaser it is a *bona fide* purchase, and not intended by him as a cover for a loan, there being nothing in the law making such a purchase (if real) unlawful; it would seem to be doing violence to the contract as it is set forth in words, and also as understood in the minds of the parties, especially of the purchaser, to hold it a loan and not a purchase. Was there ever an agreement to loan money in the case supposed, either in fact or intent? Did two minds ever meet and assent in fact or intent upon any such contract, and does not the law by its potent power of construction, when it declares such a purchase usurious, annihilate the actual agreement of the parties, and substitute another in its stead totally different from it, thus changing an act in itself lawful into one which is declared to be a violation of a penal statute? When one intentionally takes eight instead of seven per cent, though he may not intend to be guilty of usury, he is nevertheless guilty, for he intends to do what he does, but mistakes the law. Here, however, he buys a security which turns out to be accommodation paper, but he never agreed to buy any such paper; he contracted to buy it as being business paper. He was mistaken in the fact, not in the law. Nevertheless, it is the settled doctrine of the courts that such a transaction is usurious. See 2 Johns. Cas. 66, 206, 2d ed.; 15 Johns. 44, 355; 7 Wend. 569. The consequence of this doctrine as applied to this case is, that the draft was, in the hands of the defendant, so far as respects his right to maintain an action on it, tainted with usury and void.

The next question is whether the note made by the complainants to secure the amount due upon the draft when such draft was taken up, is also usurious and void. The complainant's counsel insists that it is a new security, substituted in the place of an usurious one, and therefore is itself tainted with usury. And such is

undeniably the true doctrine as applied to ordinary cases of new securities substituted in the place of usurious ones, and is illustrated by the case of renewals of a usurious note ; and I apprehend that a change of a part, or even all of the names upon the paper, would not alter the legal rule. The defendant's counsel admits the existence of this rule, but maintains that it is not applicable to a case where the holder of the tainted security is innocent of the usury in fact : and that the defendant in this case, though his purchase of the draft was technically usurious, is entitled under this rule to stand in the place of an innocent holder.

What then is the rule as to securities given in the place of usurious ones, to secure the amount to an innocent holder of the latter ? In *Cuthbert et al. v. Haley*, 8 Durnford & East, 399, the plaintiff brought debt on a bond for £2680, conditioned to pay £1340 with interest, and the defendant pleaded that the bond was given for securing money lent by one Plank to the defendant upon a usurious contract between Plank and the defendant, &c. On the trial, it appeared that Plank discounted eighteen promissory notes of the defendants, amounting to £1344 2s. 3d., and took usurious interest on them. Plank afterwards carried them to the plaintiffs, his bankers, who gave him credit for them. When the notes fell due, the plaintiff applied for payment, and the defendant paid him £44 2s. 3d. in money, and gave the bond in question for the residue. Lord *Kenyon* was of opinion that the plaintiff should recover, and so ruled, allowing a rule to show cause. On the argument of the cause at bar, the defendant's counsel strenuously urged that the bond in question was but a substituted security, and cited various cases in which such securities had been held usurious. The judges, however, were unanimously of opinion that this rule, though they fully admitted its existence, and its application in ordinary cases, did not apply to a case where the substituted security was given to an innocent holder. So, too, in *Powell v. Waters*, 8 Cowen, 669, 690, 691, 692, Chancellor *Jones* (after having said that Parish, who discounted the first note, knew it was not business paper, and that his knowledge affected his partners), declares that the note then before the Court was a substituted security for the first, and therefore void : and adds that such substituted security, given to an innocent holder, would be valid. He says that a new security taken by such a meritorious holder of the usurious note has a just claim to protection. The rule then is clearly

established, that an innocent holder of paper substituted for usurious paper will be protected, and that the ordinary principle, which declares that a new security is infected with the same usury which tainted that for which it is substituted, is inapplicable to an innocent holder of usurious paper.

Is the defendant to be regarded as an innocent holder of the draft in question in this suit? It is true that by a series of decisions, which I have already cited, the act of purchasing the draft (though he erroneously supposed it to be business paper, and therefore a lawful article of sale and purchase), was technically legally usurious. But was he guilty in intent and in fact? Could he have been punished by an indictment under the Act of 1837? On the contrary, was he not the innocent purchaser of this paper, and the victim of the civil disabilities incurred under the act by the most flagrant false pretences of one of the individuals who now asks a court of equity to visit upon him the consequences which flow from such fraudulent misrepresentations? Though this draft be held void in the defendant's hands, yet, could he not sustain an action against S. Holmes for the loss he suffered by reason of his false affirmation that the draft in question was his own property, and therefore a lawful subject of purchase, when it was not; by reason of which the very act of purchasing rendered the purchase void? Could he not also recover in an action for money had and received, the money he advanced upon this purchase; which was valueless, solely by reason of the fraudulent concealment and misrepresentation of a fact in relation to the draft? Can a man by the grossest fraud, amounting, as I think, to the offence of obtaining money by false pretences, get another's money (without any intentional fault on the part of that other), and not be responsible for it at law? I think not. I think S. Holmes was liable to the defendant for the money he obtained from him by the fraudulent transfer of paper which he falsely declared to be his own, and which, if it had been so, would have been a valid and available security in the defendant's hands. If, then, this money was really due and recoverable from Holmes, would not a note given by S. Holmes alone, to secure it, be good and available against him? Suppose that the defendant had, while he held the draft, learned that it was not the property of Holmes, and that by Holmes's false representation he had parted with his money under circumstances which rendered the draft void in his hands, and had called on Holmes and charged

him with the fraud, and Holmes had then taken up the draft and given his own note instead of it ; could Holmes defend himself against a suit on such note on the ground of usury ? Would it not be allowing him to succeed in a defence founded on his own fraud instead of the fraud of his antagonist ? Suppose he had transferred a forged note, or a note infected with existing usury, or void for any other cause, affirming it to be good, and denying the facts which rendered it void, would he not be liable ? And if he had got back the void paper and given his own note in its stead, could he defend himself in a suit upon such note ? I think the merits of his defence would be the same in all the cases I have supposed. If the new security then would have been free from objection for usury, if executed by S. Holmes alone, it must be so notwithstanding others signed the note as sureties. In *Cram v. Hendricks*, 7 Wend. 569, 584, the chancellor, in commenting on the case of *Munn v. Ruggles*, 15 Johns. 57, says in express terms, that the broker who sold the bill to the purchaser was liable to him for the money advanced, though the note might be void in the hands of such purchaser, he, like the defendant in this case, supposing that the agent owned the bill. This opinion of the chancellor, though not necessary to the decision of that case, is entitled to great weight as the opinion of a learned jurist ; and the weight of that authority I think is somewhat strengthened by the fact that the chancellor was for holding the doctrine impeaching securities for usury with greater strictness and rigor than a majority of the court in the case then before them. I am not prepared to say that Holmes would have been responsible for more than the money he advanced, especially in an action for money had and received or money paid ; though he probably might be for the full amount of the draft in an action on the case. But however that may be, I do not think that embracing in the new note the whole amount of the draft would render that note usurious, provided it would not otherwise be so. If the false affirmation had been true, the draft would have been available to the defendant for the whole amount of it, and if Mr. Holmes had chosen to indemnify him by giving him a note for that amount, I do not see that it would be usurious ; or even that he could in a suit upon this note have set up a defence as to the excess. To sustain this bill, however, the note must be adjudged void for usury, which, for the reasons before stated, I am of opinion cannot be maintained. To sustain it would be to make the Court the organ of great injustice ; I

do not mean merely by enforcing the statute against usury even in its utmost rigor, severe as that statute is ; for he who will knowingly violate the statute must not complain if he is compelled to suffer the extreme penalties of the act ; but it would present Mr. Holmes in the attitude of fraudulently obtaining the defendant's money for worthless paper, and after receiving back the paper and giving his own note as an equivalent, then asking the Court of Chancery to make his fraud successful, and to protect him in the possession of its fruits, by declaring the note thus given void for usury. I cannot but think that to carry the principle to such an extent would be, in the language of Lord *Kenyon* in the case before cited from *Durnford & East*, extending it further than policy or the words of the act require. I have already remarked that in my judgment the securities must stand or fall with this principle, that if this note would be good if made by *Sylvanus Holmes* alone, it must be adjudged good though others unite with him in securing a demand due from and legally collectible of him.

The conclusion to which this view of the subject brings me, without examining the other questions raised and discussed by the counsel, is that the bill should be dismissed with costs.

WALWORTH, CHANCELLOR, said that he concurred in the opinion of the vice-chancellor, that where the holder and apparent owner of negotiable securities sells them at a discount to a *bona fide* purchaser who has no knowledge of the purpose for which such securities were made, the holder representing such securities to belong to himself, and to be business paper, the transaction was not usurious as between the vendor and the vendee ; although the representation of the vendor was false, and the securities were in fact made for the sole purpose of being sold at an usurious discount in the market.

Decree affirmed with costs.

CAMERON v. CHAPPELL *et al.*

(24 Wendell, 91. Supreme Court of New York, May, 1840)

Usury. — Acceptance of a bill in consideration that a shipment of wheat shall be made to the drawee by the drawer does not make the bill accommodation paper between the parties; and such bill is not tainted with usury by the fact that the drawer afterwards procured it to be discounted at a rate of interest beyond that allowed by law.

THIS was an action on bill of exchange, for \$797, drawn by Joseph Strangham, on the defendants, dated 12th December, 1836, payable to his own order five months after date. The defendants accepted the draft in consideration of a promise on the part of Strangham, to send the acceptors 600 bushels of wheat, to be shipped on the opening of navigation at Buffalo. The wheat was in Canada, and the acceptors resided at Rochester. Strangham, before maturity of the bill, had it discounted by an agent of the Commercial Bank of Upper Canada, who charged him beyond the legal rate of interest of Canada, one per cent for agency, in collecting, &c. The defendants insisted, by way of defence, that the bill was accepted merely for the accommodation of Strangham, and that consequently it having no legal inception until negotiated to the bank, they could avail themselves of the usury. Witnesses were examined on the part of the defendants to establish the facts alleged by them, and that not any wheat was received by the defendants from Strangham. The cause was heard by a referee, who reported in favor of the defendants. The plaintiff, in whose name the suit was prosecuted, for the benefit of the bank, moved to set aside the report and for a re-hearing.

NELSON, C. J. The only question made in the case is whether the defendants are to be regarded as accommodation acceptors, and standing in the light of sureties upon the paper, or as having parted with it to Strangham for value, to wit, on an engagement upon his part to pay the amount at maturity in wheat. If the former is the true exposition of the case, then the acceptance had no inception till the negotiation with the agent of the bank, and, therefore, is tainted with usury; if the latter, it is to be regarded

as business paper in the hands of Strangham, and the transfer by him valid within the case of *Cram v. Hendricks*, 7 Wend. 569.

No doubt the promise thus to pay would be binding and constitute a good consideration for the acceptance of the draft, and the taking of it up by the defendants would be but the payment of their own debt, and not money paid for the use of the drawer. This is abundantly settled in the cases of cross notes or acceptances for the mutual accommodation of the parties; they are respectively considerations for each other. *Rolfe v. Caslon*, 2 H. Bl. 570; *Cowley v. Dunlop*, 7 T. R. 565; *Buckler v. Buttivant*, 3 East, 72; *Rose v. Sims*, 1 B. & A. 521; *Rice v. Mather*, 3 Wend. 62; *Byles, Bills of Exch.* 62; *Chitty, Bills*, 443. Mr. Byles lays down the proposition thus: If a man gives his acceptance to another, that will be a good consideration for a *promise*, or for another bill, though such acceptance be unpaid.

I have looked attentively into the facts of the case as disclosed by the three witnesses who were present at the arrangement between the parties, and am of opinion that the preponderance is decisively in favor of the conclusion, that the undertaking of Strangham to deliver wheat in the spring, constituted the consideration of the acceptance. His own account of it is express and precise, that he was to deliver 600 bushels, to be shipped at Buffalo. The other two are less distinct, but in the main, rather confirm than weaken this view of the transaction. They do not recollect that this precise quantity was fixed upon, but agree that it was the understanding to pay in wheat; and one states that he thinks the price was not to exceed 10s. 6d., which would bring the quantity about as stated by Strangham himself.

Again: what affords a strong corroborative circumstance of Strangham's account, and that he was not the mere agent of the acceptors, as contended, is, that neither of the two witnesses pretend that the acceptance was not to be used except in the purchase of wheat. On the contrary, Alleyn states that it was understood if wheat could not be purchased on satisfactory terms, then Strangham was to put the acceptors in funds to take up the draft at maturity; impliedly conceding the right to use it as his own for any purpose, and that the acceptors would look exclusively to his personal responsibility for the liabilities they had assumed.

In all the cases to which I have referred in respect to counter

bills or notes, it is conceded that there can be no remedy upon the implied promise of indemnity as in the case of principal and surety, or principal and agent, because the party had assumed his liability in consideration of a delivery of notes or acceptances to an equivalent amount, and therefore he must seek his remedy upon them; that the implied promise was negatived by the facts, and could not be raised *ultra* the bills or notes. This ground is very fully and satisfactorily examined by *Lawrence, J.*, in *Cowley v. Dunlop*, and Lord *Ellenborough* in *Buckler v. Buttivant*.

So here, the defendants trusted to the undertaking to purchase and deliver the wheat as the consideration for the acceptance, and will be obliged to look to that for their remedy in case of failure to perform. They made the paper their own by the arrangement, and in taking it up they but pay their own debt.

Upon the whole I am satisfied the referee has mistaken the legal effect of the proof, and therefore the report must be set aside, costs to abide the event.

We have inserted the foregoing cases upon the law of usury, as affecting bills and notes, because they embrace some of the most essential and controlling questions upon that subject; and we scarcely felt at liberty wholly to ignore all questions of that character which not many years since occupied so large a space in the reported cases upon our general subject, and are still of interest upon all questions of illegality in the consideration of bills or notes. But the present state of legislation, in most of the States, upon the subject of usury, seems to give a very decided indication, that there will soon be little occasion to discuss these questions in court. We shall therefore occupy no further space in regard to them.

PRESENTMENT AND DEMAND FOR PAYMENT.

MICHAEL MUSSON and GEORGE O. HALL, surviving partners
of WILLIAM NOLL, v. WILLIAM A. LAKE.

(4 Howard, 262. Supreme Court of the United States, December, 1845.)

Necessity of presentment. — The notary should present the paper when he demands payment; and this rule has not been changed by statute in Louisiana. Even if it had been there changed, as the defendant's contract was to be performed in Mississippi where the law merchant prevails in this particular, presentment could not be dispensed with.

Protest, how far evidence. — A protest which only states that payment was demanded, is not evidence to prove presentment.

THE case is stated in the opinion of the Court.

M'KINLEY, J. The plaintiffs brought an action of assumpsit, in the Circuit Court of the United States for the Southern District of Mississippi, against the defendant, as indorser of a bill of exchange, drawn at Vicksburg, in said State, by Steele, Jenkins, & Co., for \$6133, payable twelve months after the first day of February, 1837, to R. H. and J. H. Crump; and addressed to Kirkman, Rosser, & Co., at New Orleans, and by them afterwards accepted, and indorsed by the payees and the defendant.

On the trial of the cause, the plaintiffs offered to read as evidence to the jury a protest of the bill of exchange, to the reading of which the defendant objected; because it did not appear in the protest that the notary had presented the bill to the acceptors, or either of them, when he demanded payment thereof. And upon the question, whether the protest ought to be read to the jury as evidence of a presentment of the bill to the acceptors for payment, or as evidence of the dishonor of the bill, the judges were opposed in opinion. Which division of opinion they ordered to be certified to

this Court; and upon that certificate the question is now before us for determination.

The indorser of a bill of exchange, whether payable after date or after sight, undertakes that the drawee will pay it, if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder cause it to be protested, and due notice to be given to the indorser, then he promises to pay it. All these conditions enter into and make part of the contract between these parties to a foreign bill of exchange; and the law imposes the performance of them upon the holder, as conditions precedent to the liability of the indorser of the bill. A presentment to and demand of payment must be made of the acceptor personally, at his place of business or his dwelling. Story, Bills, § 325. Bankruptcy, insolvency, or even the death of the acceptor will not excuse the neglect to make due presentment; and in the latter case it should be made to the personal representatives of the deceased. Chitty, Bills, 7th London ed. 246, 247; Story, Bills, 360; 5 Taunt. 30; 12 Wend. 439; 2 Douglass, 515; Warrington v. Furber, 8 East, 242, 245; Esdaile v. Sowerby, 11 East, 117; 14 East, 500.

The reasons why presentment should be made to the drawee are, first, that he may judge of the genuineness of the bill; secondly, of the right of the holder to receive the contents; and thirdly, that he may obtain immediate possession of the bill upon paying the amount. And the acceptor has a right to see that the person demanding payment has a right to receive it, before he is bound to answer whether he will pay it or not; for, notwithstanding his acceptance, it may have passed into other hands before its maturity. And he, as well as the drawee, has a right to the possession of the bill upon paying it, to be used as a voucher in the settlement of accounts with the drawer. Story, Bills, § 361; Hansard v. Robinson, 7 Barn. & C. 90.

Mr. Justice *Story* has given the form of a protest now in use in England, in his treatise on Bills of Exchange, by which it will be seen that the words "did exhibit said bill" are used, and a blank is left to be filled up with "the presentment, and to whom made, and the reason, if assigned, for non-payment." Story, Bills, 302, note. This, with the authorities already referred to, shows that the protest should set forth the presentment of the bill, the demand of payment, and the answer of the drawee or acceptor. The holder of the bill is the proper person to make the presentment of it for

payment or acceptance. Story, Bills, § 360. But the law makes the notary his agent for the purpose of presenting the bill, and doing whatever the holder is bound to do to fix the liability of the indorser. Every thing, therefore, that he does in the performance of this duty must appear distinctly in his protest. He is the officer of a foreign government; the proceeding is *ex parte*; and the evidence contained in the protest is credited in all foreign courts. Chitty, Bills, 215; Rogers v. Stevens, 2 T. R. 713; Brough v. Parkings, 2 Ld. Raym. 993; Orr v. Maginnis, 7 East, 359; Chesmer v. Noyes, 4 Camp. 129. The evidence contained in the protest must, therefore, stand or fall upon its own merits. It rests upon the same footing with parol evidence; and if it fails to make full proof of due diligence on the part of the plaintiff, it must be rejected.

But the counsel for the plaintiffs insists that the statute of Louisiana, and the interpretation given to it by the Supreme Court of that State in the case of Nott's Executor v. Beard, 16 Louisiana, 308, have so changed the law merchant, as to render unnecessary the presentment of a foreign bill for payment. After a careful examination of the opinion of the Court in that case, we are unable to perceive any intention manifested to depart from the settled usages of the law merchant; but, on the contrary, they attempt by argument and authority to bring the case within that law. The question before that Court was the identical question now before us. The protest was objected to because it did not show that the bill had been presented by the notary to the acceptors for payment. To this objection, that Court said it might perhaps have been more specific, if, in the protest, it had been stated that the bill was presented, and payment thereof demanded. And they admit the law is well settled, that, before the holder of an accepted bill can call on the drawer for payment, he must make a presentment for, or demand of payment, and give notice of the refusal. Here, then, is a definite proposition, asserting that a presentment for payment and a demand of payment are convertible terms, and that the proof of either would be sufficient.

To support this proposition, they refer to Chitty on Bills, and Bayley on Bills, and the annotators on them. And as further proof and illustration, and to show that demand of payment should be preferred to presentment for payment, they refer to the statute of Louisiana, passed in 1827, in which they say the word "demand"

is used in it, and that the word "presentment" is not; and they refer to the statute, also, to show that notaries were vested with certain powers by it, which gave authority to their acts; and that they being public officers, the presumption of law is, that they do their duty; and therefore, if the protest were defective, and liable to the objection urged against it, this presumption of law would cover all such defects. This is substituting presumption for proof, in violation of all the rules of evidence.

With all due respect for that distinguished tribunal, we are constrained to dissent from the general proposition they have laid down on the subject of demand and presentment, and from all their reasoning in support of it. Due diligence is a question of law; and we think we have shown, by abundant authority, that the holder of an accepted bill, to fix the liability of the drawer or indorser, must present it to the acceptor and demand payment thereof. It may be well here to repeat what Lord *Tenterden*, C. J., said on this subject, in delivering the judgment of the Court of King's Bench, in the case of *Hansard v. Robinson*, before referred to. He said: "The general rule of the English law does not allow a suit by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes in this case an exception to the general rule. What, then, is the custom in this respect? It is, that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto*, in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money?" This extract, we think, furnishes a full answer to all that has been said by the Supreme Court of Louisiana to prove that it is not necessary to present the bill to the acceptor for payment; and to the presumption of law relied on to cure the defects in the protest.

But to show that, by the statute of Louisiana, the presentment of a bill to the acceptor for payment is not dispensed with, and that the presentment is, by a fair construction of the act, as much within its true intent and meaning as the demand, we proceed to examine its provisions. The principal object of the legislature in passing this statute seems to have been to give authority to notaries to give

notices, in all cases of protested bills and promissory notes ; and to make their certificates evidence of such notices. And, therefore, all that is said on the subject of the demand and the manner of making it, and the other circumstances attending it, was not intended as a new enactment on these subjects, but as inducement to the powers conferred on the notary, which was the principal object of the statute, as will appear, we think, by reading it. That part of it which relates to this subject is in these words: "That all notaries, and persons acting as such, are authorized, in their protests of bills of exchange, promissory notes, and orders for the payment of money, to make mention of the demand made upon the drawee, acceptor, or person on whom such order or bill of exchange is drawn or given, and of the manner and circumstances of such demand ; and by certificate, added to such protest, to state the manner in which any notices of protest to drawers, indorsers, or other persons interested were served or forwarded ; and whenever they shall have so done, a certified copy of such protest and certificate shall be evidence of all the notices therein stated."

It seems to have been taken for granted by the legislature, that the notaries knew how to make out a protest, and therefore they did not prescribe the form, but gave the substance of it, to which the notary was required to add a certificate of the manner in which he had given notices, and when done, according to the statute, a certified copy of the protest and certificate should be evidence, not of the demand and manner and circumstances of the demand, but of the notice only. This shows that the intention of the legislature, in passing this part of the statute, was merely to authorize the notaries to give notices, and to make the copy of the protest, and the certificate added to it, evidence of notice in the courts of Louisiana. But independent of this view of the subject, we think the language employed in this statute includes the presentment of the bill for payment, and for all other purposes, as fully as it does the demand of payment. In giving construction to the act, the phrase, "and of the manner and circumstances of such demand," cannot be rejected, but must receive a fair interpretation. When taken in connection with other parts of the statute, what do these words mean ? The manner of making a demand of payment, we have seen, is by presenting the bill to the drawee or acceptor ; and so important is this part of the proceeding, that the omission to present the bill to the acceptor will justify his refusal to pay it, al-

though payment be demanded. The legislature cannot be presumed to have intended to make so important a change in the law merchant as that ascribed to them by the counsel for the plaintiffs, without at the same time providing some other mode of obtaining the acceptance and payment of bills of exchange, and of holding drawers and indorsers to their liabilities. It is but reasonable, therefore, to give to the phrase before referred to such construction, if practicable, as will leave the law merchant as it stood before the passage of the statute, and carry into effect the main intention of the legislature. This, we think, may fairly be done without doing any violence to the intention or the language of the statute.

The manner of the demand must, therefore, mean the presentment of the bill for either acceptance or payment; and the circumstances of the demand, we think, means the place where the presentment and demand is made, and the person to whom or of whom it is made, and the answer made by such person. It is very clear, that bills payable at sight, and after sight, are within the meaning of the statute; because it provides for a demand of payment of the acceptor of a bill. Now, how can there be an acceptor of a bill, without a presentment for acceptance? Until the bill become due, payment cannot be demanded of the drawee. This shows, that without the word presentment and the word demand also, the plain meaning of the statute could not be carried into effect. A bill, payable at a fixed period after its date, need not be presented for acceptance; it is sufficient to present it and demand payment when it arrives at maturity; but a bill payable at sight, or after sight, can never become due until after it has been accepted. How is the holder or the notary to obtain the acceptance of such a bill, under the decision of the Supreme Court of Louisiana? Will it be sufficient to demand payment of the bill? That would be a nugatory act, because it is not due; then it must be admitted, that, by fair and necessary construction, the word presentment is within the plain meaning and intention of the statute, and that the bill may be presented for acceptance or for payment, and therefore neither the statute nor the decision of the Supreme Court of Louisiana has changed the law merchant in any of these respects.

There is, however, another question, entirely independent of the statute and the decision of the Supreme Court of Louisiana, which may be decisive of the case before this Court; and that question is, Whether the contract between the holder and indorser of the bill

in controversy is to be governed by the law of Louisiana, where the bill was payable, or by the law of Mississippi, where it was drawn and indorsed. The place where the contract is to be performed is to govern the liabilities of the person who has undertaken to perform it. The acceptors resided at New Orleans; they became parties to the bill by accepting it there. So far, therefore, as their liabilities were concerned, they were governed by the law of Louisiana. But the drawers and indorsers resided in Mississippi; the bill was drawn and indorsed there; and their liabilities, if any, accrued there. The undertaking of the defendant was, as before stated, that the drawers should pay the bill; and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought, and is now depending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must, therefore, be governed by the laws of the latter State. Story, Bills, § 366; 4 Peters, 123; 2 Kent's Comm. 459; 13 Mass. 4; 12 Wend. 439; Story, Bills, § 76; 4 Johns. 119; 12 Johns. 142; 5 East, 124; 3 Mass. 81; 3 Cowen, 154; 1 Cowen, 107; 5 Cranch, 298.

Whatever, therefore, may have been the intention of the legislature in passing the statute, and of the Supreme Court of Louisiana in the decision of the case referred to, neither can affect, in the slightest degree, the case before us. In Mississippi, the custom of merchants has been adopted as part of the Common Law; and by that law and their statute law, this case must be governed. We think, therefore, the protest offered by the plaintiff, as evidence to the jury, ought not to have been received as evidence of presentment of the bill to the acceptors for payment, nor as evidence of the dishonor of the bill; which is ordered to be certified to the Circuit Court accordingly.

McLean and Woodbury, J.J., dissented as to the effect of the protest, regarding it as sufficient evidence of presentment. They agreed with the majority as to the necessity of presentment, — the point intended to be illustrated here.

The principal case is supported, as to the necessity of presentment, by *Arnold v. Dresser*, 8 Allen, 435; *Shaw v. Reed*, 12 Pick. 132; *Freeman v. Boynton*, 7 Mass. 483; *Whitwell v. Johnson*, 17 Mass. 449; *Gilbert v. Dennis*, 3 Met. 495.

The loss of negotiable commercial paper will not dispense with the necessity

of due presentment and the subsequent proceedings necessary in ordinary cases to charge prior parties. Presentment in such case can be easily made upon a copy, if a new bill cannot be obtained, and will be sufficient. *Hinsdale v. Miles*, 5 Conn. 331; *Dehers v. Harriot*, 1 Show. 164; *Wain v. Bailey*, 10 Adol. & Ellis, 616; *Charnley v. Grundy*, 25 Eng. L. & Eq. 318; Story, *Bills of Exchange*, § 348; *Kyd, Bills*, 139 (3d. ed.); 2 *Parsons, Notes and Bills*, 260.

If the lost paper was not negotiable, no presentment would be necessary in the case of a note, as there would be no one to charge by notice; but in the case of a bill it would be necessary to make the presentment, in order to charge the drawer. See *LOST BILLS AND NOTES, post*.

If the holder or notary has the paper with him when he makes the demand, but does not present it, yet so describes it as to leave no doubt that the payor may understand of what paper payment is demanded, this is sufficient. *Etheridge v. Ladd*, 44 Barb. 69.

RENNER, Plaintiff in Error, v. THE PRESIDENT, DIRECTORS, &C., OF THE BANK OF COLUMBIA, Defendants in Error.

(9 Wheaton, 581. Supreme Court of the United States, February, 1824.)

When demand should be made. Usage of banks. — A custom of all the banks of the District of Columbia to demand payment and give notice to indorsers of commercial paper on the fourth day after the day of payment named, which has been uniformly followed for upwards of twenty years, and which was known to and understood by the defendant when he indorsed the paper, is to be considered as entering into the contract, so that demand and notice on the fourth day are sufficient to charge the indorser.

THE case is stated in the opinion of the Court.

THOMPSON, J. This case comes up on a writ of error to the Circuit Court of the District of Columbia; and by the record it appears that the action in the Court below was prosecuted against Renner, the plaintiff in error, as indorser of a promissory note, drawn by James Foyles, and discounted at the Bank of Columbia. The note bears date on the ninth day of January, 1817, for four thousand six hundred dollars, and is payable sixty days after date. In the declaration it is averred, that demand of payment of the maker was made on the fourteenth of March, which was on the fourth day after the expiration of the sixty days, which the note had to run.

Several questions, arising out of the record, have been presented for the consideration of the Court. The principal one, however, is that which relates to the time of demand of payment of the maker of the note, and grows out of a bill of exceptions taken upon the trial. This has been pressed upon the Court as a question of great importance, and the decision of which, in its application to the concerns of the bank, will have a very wide and extensive effect.

We shall proceed to the consideration of this point, in the first place, leaving the others, which are of minor importance, to be noticed hereafter.

The testimony given at the trial was for the purpose of showing that the Bank of Columbia had, from its first establishment, in 1793, adopted the practice of demanding the payment of notes discounted by it, on the fourth day after the time limited for the payment thereof, according to the express terms of the note. And that such was the universal custom of all the banks in Washington and Georgetown. That this custom was well known and understood by the defendant, when he indorsed the note in question. After this testimony had been received, without objection, the counsel for the defendant below called upon the Court to instruct the jury, that upon the evidence so given by the plaintiffs, of a demand upon the maker of the note, on the fourth day after the time limited by the note for the payment, the defendant was not liable on his indorsement; which instruction the Court refused to give, and a bill of exceptions was thereupon taken.

This Court must, therefore, assume as established facts (and, looking at the evidence before the jury, no doubt could be entertained on the subject), that the custom of the Bank of Columbia, and all the other banks in Washington and Georgetown, from their first institution, had been, to demand payment of notes due them, on the fourth day after the time limited therein; and that this custom was known and well understood by the defendant, Renner, when he indorsed the note in question; and it may be added, with full knowledge and expectation, that this note was to be dealt with in the same way; for it was a renewal of a discount, continued for a considerable time before, on other notes similarly drawn and indorsed, some of which had been demanded in like manner, and protested, and afterwards paid and taken up by himself. Under such circumstances, it would seem, that nothing short of some

positive and unbending principle of law, could shield the defendant from responsibility. But, so far from trenching upon any such principle, we think his liability completely established, by well-settled rules of law.

It seems to be assumed as the settled law of promissory notes, that in order to charge an indorser, demand of the maker must be made on the third day after that limited in the note; and that this is so stubborn a rule, that parties are not permitted to violate it, even by their mutual agreement.

We admit, in the most unqualified manner, that the usage of making the demand on the third day of grace, has become so general, that courts of justice will notice it *ex officio*; and in the absence of any proof to the contrary, will presume that such was the understanding of all parties to a note, when they put their names upon it. But that this rule has any attributes so inviolable as not to be touched by the parties to negotiable paper, cannot be admitted. It has its origin in custom, and that custom, too, comparatively, of recent date; and is not one of those, to the contrary of which the memory of man runneth not, and which contributed to make up the common-law code, which is so justly venerated. So far from this, that the allowance of any days of grace, is in derogation of the common-law rule, applicable to other contracts. They are, emphatically, the mere creatures of usage, varying in different countries, to suit the views and convenience of men in business, originally gratuitous, and not binding on the holder. The common law would require payment on the last day limited by the contract, and would also give to the maker the whole of that day. It is a settled principle of the common law, applicable to all contracts, that a party has until the last day limited by his agreement, to perform his engagement, and even until the last hour of the day. The common law knows of no fractions of a day; custom, however, and that introduced, too, principally by banks, has limited the day to a few hours of business. But this, and whatever other rules have been adopted by consent, and merely for the convenience of commercial men, are departures from the common-law doctrine. When, therefore, the allowance of only three days of grace, is said to be the law of the contract, by bills of exchange and promissory notes, nothing more can be intended, than that custom has so long sanctioned this rule, that all dealers in paper of this description, are understood to govern

themselves by it. The law of the contract, properly speaking, is to pay when due; and that time is to be ascertained, either from the contract *per se*, or that taken in connection with some known custom, which the parties are presumed to have tacitly consented should be made a part of the contract. And it is in this view only, that three days of grace are allowed, where the custom is recognized as the rule: for a note, which upon its face has sixty days to run, is in truth and in fact a contract for sixty-three days, and interest is taken for that time. And how is it ascertained that it is a note for sixty-three days, but by looking out of the contract, and finding what was the understanding of the parties? Where the custom has existed for a long time, and has become general, courts of justice, as before observed, will notice it *ex officio*; and where it has not, it is matter of proof. If this is not the light in which these transactions are to be considered, all banks are chargeable with usury; for all take interest beyond what is allowed by law, if time is to be determined by the note itself. The general rule of law is, that demand of payment must be made of the maker when the note falls due; and that time, as now settled, is on the last day of grace; and even this rule is of recent date, for in the King's Bench in England, as late as the year 1791, about coeval with the institution of this bank, and the custom established by it, we find *Leftley v. Mills*, 3 T. R. 370, Lord *Kenyon* and Mr. Justice *Buller* differing on this very point; the former holding that, by analogy to other contracts, the acceptor of a bill of exchange had the whole of the third day of grace to pay the bill, and that a demand on the fourth day was not too late. Mr. Justice *Buller* thought the demand ought to be made on the third day of grace; that the nature of the acceptor's undertaking, was to pay the bill on demand, on any part of the third day of grace; and he inferred this, from its having been, as he said, the practice to make the demand on that day. If it was a doubtful question in England, so late as the year 1791, whether the demand ought to be made on the third day of grace, or the day after, this bank is not chargeable with any culpable innovation upon long-established rules of law or usage, by adopting the practice of making the demand on the fourth day.

It is said, however, that the effect of this testimony is, to alter and vary, by parol evidence, the written contract of the parties. If this is the light in which it is to be considered, there can be no

doubt that it ought to be laid entirely out of view ; for there is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence, to contradict or substantially vary the legal import of a written agreement. Evidence of usage or custom is, however, never considered of this character ; but is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom ; for the custom, then, becomes a part of the contract, and may not improperly be considered the law of the contract ; and it rests upon the same principle as the doctrine of the *lex loci*. All contracts are to be governed by the law of the place where they are to be performed ; and this law may be, and usually is, proved as matter of fact. The rule is adopted, for the purpose of carrying into effect the intention and understanding of the parties. That the note in question was to be paid at the Bank of Columbia, and to be governed by the regulations and custom of the institution, and so understood by all parties, cannot admit of a doubt.

It would be a waste of time, to go very much at large into an examination of the various usages and customs, that are admitted in evidence and recognized in courts of justice, both in England and in this country, in almost every branch of business, and especially in commercial transactions, for the purpose of ascertaining the meaning and interpretation of contracts. A few only will be noticed, that are somewhat analogous to the present case.

In the case of *Cutter v. Powell*, 6 T. R. 320, where was brought under consideration the legal effect of a promissory note, given to the mate of a ship for a certain sum of money, provided he proceeded on her voyage, and continued to do duty to the port of destination. The legal construction to be given to this note was clear, and so considered by the Court, that nothing was due, unless the mate continued to do duty to the port of destination. He having died, however, on the voyage, the Court directed an inquiry into the usage of merchants in such cases, declaring that if it sanctioned an allowance for the time the service was performed, the plaintiff should recover according to such usage.

No intimation is here given, that such proof would be repugnant to the contract, although it was against the legal import of the note, if construed without reference to the usage ; and although the usage related to trade, it was very limited in its application.

So in *Noble v. Kennoway*, 2 Doug. 511, usage of trade was admitted in evidence, to explain the understanding of parties, in a policy of insurance, although the usage had not existed three years. Lord *Mansfield* said, the usage could only be known by proof, and must be tried by a jury; that underwriters must be presumed to be acquainted with the practice of the trade they insure, whether recently established or not. If it were necessary, cases might be multiplied almost without end, showing the same principle and same recognition of local and particular usages, in almost every branch of business.

We have also in the State courts in our own country, the decisions of very enlightened judges, adopting the same principles, and governing themselves by the same rules; and, in many cases, not unlike the one before us.

In *Jones v. Fales*, 4 Mass. 245, 252, the same doctrine as to usages of banks, was fully sanctioned; and although that particular usage might have been found, in practice, inconvenient, and not to meet public approbation, yet the principle which governed the decision of the Court, is not thereby weakened; viz., that the usage with which the defendant was conversant, was proper evidence to be submitted to a jury, to infer from it the agreement of the party. And although, as suggested at the bar, this custom was altered by the banks, we do not find the courts of justice in that State attempting to control it, in its application to notes made in reference to the usage.

The doctrine of this case was again fully recognized in the *Lincoln and Kennebeck Bank v. Page*, 9 Mass. 155, where it was held, that bank usages, established respecting demands on makers of promissory notes, and notices to indorsers, being known to dealers in the banks, they were bound by them, and that the usage was proper evidence to be submitted to a jury. These cases are not referred to for the purpose of approving the particular usages, but to show that evidence of such usage was never considered as contradicting the written contract.

Halsey v. Brown and others, 3 Day, 346, is a very strong case on this subject. The question was as to the liability of ship-owners, for the loss of money taken on freight by the captain. The defence set up was, that the master, according to established custom, was permitted to take money on freight, as a perquisite to himself, and the owners discharged from responsibility; and the

question directly presented to the Court was, whether a particular custom or usage could be given in evidence, to control the general law. And the Court says, it is a principle, that the general common law may be, and in many instances is, controlled by special custom. So the general commercial law may, by the same reason, be controlled by a special local usage, so far as that usage extends, which will operate upon all contracts of this nature, made in view of, or with reference to, such usage.

In *Smith v. Wright*, 1 Caines, 43, this general principle is laid down; the true test of a commercial usage is, its having existed long enough to have become generally known, and to warrant a presumption that contracts are made in reference to it.

In the case of *The Bank of Utica v. Smith*, 18 Johns. 230, a note, payable at the Mechanics' Bank in New York, was presented and payment demanded, fifteen minutes after bank hours, and this was held sufficient; it appearing, that although it was a quarter of an hour after the usual time of closing the bank as to other business, it was within bank hours, it appearing that, according to the general course of doing business at this bank, these fifteen minutes were the usual and accustomed time for these presentments, and of this course of business the defendant ought to have informed himself.

It is unnecessary to pursue this subject farther by particular reference to decisions in the State courts. The same doctrine, as to the effect of particular usages in controlling the general law, will be found to accompany the administration of justice, wherever the subject is brought under consideration. Whether these usages are, in all instances, wise and beneficial, may, perhaps, be questionable, but where they do exist, they are considered as regulating and controlling contracts, made under and in reference thereto.

The same principle is recognized by this Court, in the case of *Yeaton v. The Bank of Alexandria*, 5 Cranch, 49; 2 Cond. 186. The Chief Justice, in speaking of the effect of usage upon the legal obligation of parties, observes, if the case showed that such was the usage of the bank, and such the understanding under which notes were discounted, this Court is not prepared to say that the undertaking created by the indorsement, would not be so fashioned as to give effect to the real intention of the parties.

These cases are sufficient to show, in the most satisfactory man-

ner, the light in which courts of justice consider contracts, made in reference to any particular usage, and the effect that such usage is to have upon them. And no good reason is perceived why these principles should not be applied to the case before us. The custom, under which this bank has transacted business for five and twenty years, of demanding payment of the drawers of notes on the fourth instead of the third day after the time limited for payment, is not unreasonable or repugnant to any principles of general policy. It does not stand alone, but is in accordance with the usage of every other bank in Washington and Georgetown. The defendant indorsed the note in question, with full knowledge of the custom. A demand on the fourth day is in perfect harmony with the principles of the common law, if applied to the contract, the maker having the whole of the third day to pay his note, and not being in default until the fourth. The inconveniences suggested on the argument growing out of a usage here, differing from that which is in practice in other places on this subject, are not of great public concern. If they exist, they affect the banks and their customers only. And if felt to the prejudice of either the one or the other, we may rest assured it would be altered. Their private interest is a sure guaranty for this.

But, admitting the practice to be inconvenient, and that a uniformity, in this respect, with other parts of the country would be desirable, the remedy is not in the hands of courts of justice, whose business it is to judge of contracts as made by parties themselves, and not to prescribe the manner in which they shall be made. We are, accordingly, of opinion that the Court below did not err in refusing to instruct the jury that the demand upon the maker of the note, on the fourth day after the time limited for payment thereof, discharged the defendant from liability on his indorsement.

One of the minor points, which has been alleged as error, appearing on the face of the record is, that the demand on the maker of the note should, at all events, have been laid on the third day after the time limited by the note for payment, and not on the fourth. This objection cannot be sustained at this time. Whether the declaration would not have been bad on demurrer, not, however, because the demand is laid on a wrong day, but because it does not aver the usage, is a question not necessary now to decide. But if, as we have determined, the demand was prop-

erly made on the fourth day, it would have been bad if laid at an earlier day, because the maker would have been under no obligation to pay, and, of course, not in default. If, therefore, the cause should be sent back to the Court below, no amendment in this respect ought to be made. The want of an averment, so as to let in the proof of usage, cannot now be objected to the record. The evidence was admitted without objection, and now forms a part of the record, as contained in the bill of exceptions. Had an objection been made to the admission of the evidence of usage, for the want of a proper averment in the declaration, and the evidence had, notwithstanding, been received, it would have presented a very different question.

The time of the demand, as laid in the declaration, is according to the legal effect of the note. If made at an earlier day, it would have given no cause of action against the indorser, for he was not bound to pay until the default of the maker, and he was not in default until the fourth day. It is a general rule, in declaring as to time, that it must be laid after the cause of action accrues.

The case of *Rushton v. Aspinall*, 2 Doug. 679, does not apply. The bill of exchange, upon which that suit was founded, was dated on the twenty-seventh of November, in the year 1778, payable three months after date. The declaration stated that the bill was presented for acceptance on the day of the date thereof, and duly accepted, and afterwards, on the same day, the acceptor was requested to pay, &c., but neglected and refused, &c., and then goes on to state the liability of the defendant, as indorser, and that he, on the same day, assumed and promised to pay, &c. It appears, therefore, that the refusal of the acceptor, and the assumption of the indorser, are laid on the day of the date of the note, which was three months before it fell due. The plaintiff, therefore, by his own showing, had no cause of action when he commenced his suit. This was a defect which no verdict could cure. He had not set forth his cause of action defectively, but shown that he had no cause of action; and this was the ground on which it was placed by the Court. A cause of action, defectively or inaccurately set forth, is cured by the verdict, because, to entitle the plaintiff to recover, all circumstances necessary in form or in substance, to make out his cause of action, so imperfectly stated, must be proved at the trial; but when no cause of action is stated, none can be presumed to have been proved.

This case is not to be considered as if before us on demurrer to the declaration. There being no averment of the special custom as to the demand on the fourth day, and the general rule being that the demand must be made on the third, if the declaration alleges it to have been made on the fourth, the joinder in demurrer admits the fact, and, of course, that the demand was too late. But had the declaration contained an averment of the special custom, it must allege a demand on the fourth day. That is according to the legal effect of the note; and a demand laid on any other day would have been bad. We must now consider the case as if the declaration had contained a special averment of the custom, the proof having been before the Court and jury without objection, and now making a part of this record.

Judgment affirmed.

But the rule in the principal case respecting usage applies only in the case of paper discounted by the banks. *Cookendorfer v. Preston*, 4 How. 317. In this case Mr. Justice *McLean*, in delivering the opinion of the Court, said: "In the *Bank of Washington v. Triplett and Neale*, 1 Pet. 25, this Court sanctions the usage to make the demand of payment of a note, which was left in the bank for collection, on the day after the last day of grace, placing such notes, in this respect, on the same footing as notes discounted by the bank. And that such was the usage in 1817, when payment on the note or bill in question was demanded, was proved in that case. But it was also proved, as appears from the record, that the usage was changed in 1818, by all the banks of Washington and Georgetown, so as to conform to the general commercial usage of demanding payment on the last day of grace. This referred to notes or bills sent to the banks for collection, and of course embraces all notes not negotiated in bank. . . .

"Now if the usage, as sanctioned in the cases above cited, governs this case, it is clear that such diligence has not been used as to charge the indorser. For, under that usage, the demand should have been made on the day after the third day of grace, when it was in fact made on the third day of grace. This objection is met by the defendant in error by the proof of the usage as stated, which he insists governs all notes not discounted by the banks of the District. The note in question was not discounted by the Bank of Washington, it being merely left there for collection. But it is insisted that this usage cannot be shown to overthrow that which has been sanctioned by judicial decisions. A local usage may be changed in the same mode by which it was established. But parol evidence is not admissible to show that the usage was different, at the time, from what the courts have solemnly adjudged it to be. The law merchant is founded upon custom, and every modification of it, by local usage, shows that, like other laws, it may be changed.

"The usage proved in this case, except in *Bank of Washington v. Triplett and Neale*, and that is explained by the evidence cited, does not conflict with that

decided by this Court, if the latter be limited to notes discounted by the banks, and the former applies to all other notes payable in the District. In other words, that the law merchant should be modified by the usage as to demand and notice on notes discounted by the banks. And it would seem from the decision above cited, the usage to demand payment the day after the third day of grace, had its origin with the banks, and has not been extended, since 1818, to paper not discounted by them. On all other paper a demand is made on the third day of grace, and the usage is to extend the protest on the day on which the notice is given, stating the demand to have been made on the last day of grace, and the protest to be dated the same day on which the notice is dated. Now a demand and protest on the last day of grace, and a notice on the following day, come strictly within the law merchant. And this was the diligence used in the present case, except the formal date of the protest on the day of the notice. No confusion can therefore arise from this general commercial usage, as it conforms to the established law. No inconvenience has arisen, it is supposed, from the bank usage in the District, which has been so long and so firmly established." See, also, upon the subject of the usage of banks in the District of Columbia, *Raborg v. Bank of Columbia*, 1 Harris & G. 231; *Bank of Columbia v. Fitzhugh*, ib. 239; *Bank of Columbia v. Magruder*, 6 Harris & J. 172; *Adams v. Otterback*, 15 How. 539.

Days of grace are allowed only to promissory notes and bills of exchange proper. Checks and notes payable on demand are not entitled to grace. *Barbour v. Bayon*, 5 La. An. 303; *Chitty, Bills*, 377; *Story, Bills of Exchange*, § 342.

There was formerly some doubt as to whether bills payable at sight were entitled to days of grace. In *Beawes, Lex Mercatoria*, Pl. 256, it is said that they are not, though days of grace would be allowed if the bill were payable one day after sight. *Kyd, Bills*, 10, expresses the same view. But it may now be considered as settled that days of grace enter into such bills, and that in this respect they differ from paper payable on demand; though the reason for any such distinction is not apparent. See *Dehors v. Harriot*, 1 Show. 163; *Coleman v. Sayer*, 1 Barnardiston, 303; *Chitty, Bills*, 377; *Story, Promissory Notes*, § 224; *Oridge v. Sherborne*, 11 Mees. & W. 374. In *Janson b. Thomas*, 3 Doug. 421 (1784), it was held that a bill of exchange, payable at sight, was not a bill payable on demand within the exception of the statute of 22 Geo. 3, c. 49. *Bulter, J.*, in this case says that, upon the point respecting days of grace there is doubt, but that the question was not new; "for in a case before *Willis, C. J.*, in 16 Geo. 2, a special jury (of merchants) certified that on bills at sight three days were allowed." Mr. Justice *Story*, as above cited, says: "In England, days of grace are allowed on all notes, whether they are payable at a certain time after date, or after sight, or even at sight. As to the latter, there has been some diversity of opinion among the profession, as well as among the elementary writers. But the doctrine seems now well established both in England and America, that days of grace are allowable on bills and notes payable at sight. And the same rule has been applied, as in strict analogy it should apply, to bank post-notes payable after sight; for they differ in nothing from ordinary bills of ex-

change. The same rule seems to apply to bills payable by instalments; and the days of grace are allowed on the falling due of each instalment." Upon the last point mentioned see *Oridge v. Sherborne*, 11 Mees. & W. 374.

It was formerly held doubtful also in some of our own courts, whether days of grace could be extended to inland bills and promissory notes; and as to the latter it was a *rexata questio* in England until the decision of *Brown v. Harraden*, 4 T. R. 148, in 1791, settled the question in favor of allowing days of grace. The doubt in both cases, in England and America, has been removed, and there is now no doctrine more firmly settled than that both inland bills of exchange and promissory notes are subject to days of grace. See 1 Parsons, Notes and Bills, 393, and note; *Bank of Washington v. Triplett*, 1 Peters, 25; *Wood v. Corl*, 4 Met. 203.

With regard to the question of usage respecting days of grace, presented in the principal case, a further step was taken in the subsequent case of *Mills v. Bank of the United States*, 11 Wheat. 431, *post*; and it was there held that where commercial paper is made payable or negotiable at a bank whose invariable usage it is to demand payment on the fourth day of grace, the parties are bound by that usage, being presumed to agree to be bound by it, though they do not in fact know it. *Story, J.*, in delivering the opinion of the Court, says that the decision is made "upon the principles and reasoning" of the principal case.

This doctrine respecting usage has been denied in New York. In *Woodruff v. Merchants' Bank*, 25 Wend. 673, *Nelson, C. J.*, said: "The effect of the proof of usage, as given in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York. We need scarcely add, even if the witnesses were not mistaken, and the usage prevails there as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper." This was in the Supreme Court of New York, in 1841; and the decision was unanimously affirmed in the Court of Appeals, 6 Hill, 174, in 1843. The principle is reaffirmed in *Brown v. Newell*, 4 Seld. 190. But this case occurs again in the Court of Appeals in 3 Kern. 290, on appeal from 2 Duer, 584, where it is held that the law of the place where a draft is made payable governs as to its being payable with or without days of grace; and the draft in this case being drawn upon a bank in Connecticut, payable on a specified day, and it being proved that days of grace were not allowed on such paper in that State, it was held that the defendants were liable on presentment and notice on the day designated, though the law in New York, where the bill was drawn and indorsed, allowed days of grace. From this case it would seem that the ground of the decision in 4 Seld. 190, was that the usage was not satisfactorily proved. The former cases then seem to be virtually overruled.

The general rule undoubtedly is, that the law of the place where the paper is payable will govern respecting the days of grace; and the origin of the indulgence being in usage, it seems consistent with reason that proof of the particular custom should be received. See *Kilgore v. Bulkley*, 14 Conn. 362; *Bryant v. Edson*, 8 Vt. 325; *Ripley v. Greenleaf*, 2 Vt. 129; *Vidal v. Thompson*, 11 Mart. La. 23; *Goddin v. Shipley*, 7 B. Mon. 575; 1 Parsons, Notes and Bills, 399.

If commercial paper fall due on Sunday, or on a holiday, it is payable the day before; and evidence will be received to show usage respecting what are holidays, in the absence of statutory provision. *City Bank v. Cutter*, 3 Pick. 411. In this case the question was whether commencement day at Harvard College could be deemed a holiday. *Parker, C. J.*, upon this point, said: "It is not in the language of the common law a holiday, though it is a day of festivity and amusement in the neighborhood of the University. But it is a fit subject of a usage which will bind all those dealing with a bank which has adopted it as a day when business is not to be done. It is found to have been the usage of the City Bank to regard it in this light, and the report finds that the defendants had express knowledge of this usage."

But proof of four instances within two years in which a bank departed from the law merchant as to the time of giving notice to an indorser, is not sufficient to establish a usage binding on the indorser. *Adams v. Otterback*, 15 How. 539. Per *McLean, J.*: "To constitute a usage, it must apply to a place rather than to a particular bank. It must be the rule of all the banks of the place, or it cannot consistently be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement." This reasoning is not at variance with that of *Parker, C. J.*, above, as it is predicated of a case in which the defendant had no knowledge of the alleged usage. See also *Dabney v. Campbell*, 9 Humph. 680.

The reasonable rule and the result of the cases seem to be that, to give a usage in respect to days of grace the force of law, it must at least be so general and have such a notoriety that an inference may be drawn that the parties contracted in reference to it; or if it is not thus general and notorious, that the defendant had knowledge of the usage, or acquiesced in the particular instance.

Mr. Justice *Story* mentions another important rule respecting days of grace. It is that the days of grace are all to be counted consecutively and in direct succession, no deduction being allowed by reason of the circumstance that a Sunday or holiday intervenes between the first and last day of grace; or, he might have added, though the first day of grace falls on Sunday or a holiday. *Story, Bills of Exchange*, § 337.

EPHRAIM DANA *v.* SAMUEL H. SAWYER.

(22 Maine, 244. Supreme Court, April, 1843.)

At what time of day presentment should be made. — When a bill or note is not payable at a place where there are established business hours, presentment for payment may be made at any reasonable hour of the day ; but presentment to the maker at near midnight, after he had retired to rest, is not a reasonable hour, and will not charge an indorser on notice, unless there was a waiver of any objection as to the time, or unless it appear that payment would not have been made upon a demand at a reasonable hour.

THIS case was submitted on the following statement of facts. The action is on a promissory note, signed by T. Sawyer & Co., dated Dec. 24, 1838, for \$202.50, on four months, payable to and indorsed by the defendant.

It is agreed that on the day the note fell due, George W. Smith came to the house occupied by said Thorndike Sawyer and Samuel H. Sawyer, the defendant, in the evening, between eleven and twelve o'clock, called up said T. Sawyer from his bed, and presented the note to him for payment, which he did not pay, and left with him a notice and demand for payment, and delivered another notice of non-payment by the makers of the note, directed to said S. H. Sawyer, and demand of payment to said T. Sawyer for said Samuel, which said Thorndike did not deliver to said Samuel. Said Samuel was then in the house, but was in bed. He had his residence in the same house.

The Court were to enter a nonsuit or default, as they might determine to be the law in the matter.

SHEPLEY, J. This case is presented upon an agreed statement of facts, from which it appears that a demand for payment was made upon the maker of the note, between eleven and twelve o'clock at night on the day that it became payable, by calling him from his bed ; and that he did not pay it. There is no further statement of any thing else said or done, except that a notice and demand for payment was left with him. When a bill or note is payable at a banking-house, or other place, where it is well known that business is transacted only during certain hours of the day, the law presumes that the parties intended to conform to such established course of business, and requires that a demand should be made during those

business hours. *Parker v. Gordon*, 7 East, 385. The cases of *Garnett v. Woodcock*, 1 Stark. 475, and of *Henry v. Lee*, 2 Chitty, 124, may show an exception to this rule that, when a person is found at such place after business hours, authorized to give an answer, the demand will be good. While it may be difficult to reconcile these cases with the case of *Elford v. Teed*, 1 M. & S. 28. When the bill or note is not payable at a place where there are established business hours, a presentment for payment may be made at any reasonable hour of the day. *Leftley v. Mills*, 4 T. R. 174; *Barclay v. Bailey*, 2 Camp. 527; *Triggs v. Newnham*, 10 Moore, 249; *Wilkins v. Jadis*, 2 Barn. & Adol. 188. What hour may be a reasonable one has come under consideration in those cases. In the first of them Mr. Justice *Buller* observes, that “to say that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences.” In the second, Lord *Ellenborough* said, “if the presentment had been during the hours of rest, it would have been altogether unavailing.” In the third, this remark, among others, is quoted and approved by C. J. *Best*. In the fourth, Lord *Tenterden* remarked, that “a presentment at twelve o’clock at night, when a person has retired to rest, would be unreasonable.” These observations, so just and so applicable to this case, authorize the conclusion, that the demand was not made at a reasonable hour, unless the fact that the maker was seen and actually called upon at that time should make a difference. Perhaps in analogy to the exception already noticed, it might be proper to admit of one in this and the like cases, if it should appear from the answer made to the demand, that there was a waiver of any objection as to the time, or that payment would not have been made upon a demand at a reasonable hour. But there is nothing in this agreed statement to show that payment might not have been refused because the demand was made at such an hour, that the maker did not choose to be disturbed, or because he could not then have access to funds prepared and deposited elsewhere for safety.

Plaintiff nonsuit.

The general rule respecting the proper time of day at which presentment for payment should be made, — that it must be made within reasonable hours, — is the same as in the case of presentment for acceptance. *Story, Bills of Exchange*, § 349; *Chitty, Bills*, 387.

What is a reasonable hour will depend partly on the place of business or domicile of the maker, and partly on the usage of trade where the paper is payable;

and in the case of paper payable at bank, while it must in general be presented during banking hours, still it may be presented after such hours, provided a person be stationed there by the bank to return answers, or if there is a custom of the bank which allows a certain length of time after closing for transacting such business. *Bank of Utica v. Smith*, 18 Johns. 230; *Chitty, Bills*, 387; *Story, Promissory Notes*, § 226; *Story, Bills of Exchange*, § 349.

If the presentment is made at unseasonable hours, either too early or too late, at a bank or banker's, or at the counting-house or dwelling-house of the maker, and there is no person there authorized to act, or ready to act, for the maker; if the presentment is made before the counting-house is open or after it is shut; in these cases the presentment will be a mere nullity. *Story, Promissory Notes*, § 226; *Story, Bills of Exchange*, §§ 236, 349.

But in the case of presentment after the maker or acceptor has retired to rest, it is worthy of note that the rule in the principal case applies only when the party has retired at the usual or proper time. If he has retired at an unusual hour, a presentment before it has become unseasonably late will be good. *Farnsworth v. Allen*, 4 Gray, 453.

In this case, presentment was made at nine o'clock in the evening, in the month of August, when it was found that the maker of the note had retired to rest; and as it appeared that he lived ten miles distant from the residence of the holder, and due diligence had been used to find him, the presentment was held to have been made at a reasonable hour. And it would seem that the same rule should apply where the presentment is made in the morning at a reasonable hour, and the maker has not arisen. See *Lunt v. Adams*, 17 Maine, 230, holding presentment at eight o'clock in the morning too early.

With the above qualification it is undoubtedly true, as stated by *Cowen, J.*, in *Cayuga County Bank v. Hunt*, 2 Hill, 635, that, except where paper is due from a bank, proper hours of business range through the whole day down to bedtime; citing *Chitty, Bills*, 421, Am. ed. 1839, and cases there cited.

It is held also in England that presentment between eight and nine o'clock in the evening, at the house of a trader or merchant, is sufficient. *Triggs v. Newnham*, 10 Moore, 249; s. c., 1 Car. & P. 631. And this, too, though the house be shut, and no one there to give an answer. *Wilkins v. Jadis*, 2 Barn. & Adol. 188, cited in the principal case. See *Chitty, Bills*, 388.

So in *Morgan v. Davison*, 1 Stark. 114, in which the paper was presented at a trader's between six and seven o'clock in the evening, when no one was present but a girl taking care of the counting-house, Lord *Ellenborough* held that the hour was a proper one, and that the holder might reasonably expect to find the payor there.

In *Barelay v. Bailey*, 2 Camp. 527, the distinction between paper payable at bank and elsewhere is again observed. Lord *Ellenborough* said: "I think this presentment sufficient; a common trader is different from bankers, and has not any peculiar hours for paying or receiving money; if the presentment had been during the hours of rest, it would have been altogether unavailing; but eight in the evening cannot be considered an unseasonable hour for demanding payment at the house of a private merchant who has accepted a bill."

TAYLOR v. SNYDER.

(3 Denio, 445. Supreme Court of New York, May, 1846.)

Where to be made. — The place of date of a promissory note payable generally, is only *prima facie* the place of payment; and though a note be made and dated in New York, if the maker then resided in Florida, and the holder knew this at the time the note was executed, and the maker has not changed his residence since that time, demand must be made of the maker in Florida in order to charge an indorser.

THE case is stated in the opinion of the Court.

BEARDSLEY, J. As the note bears date at Troy, it is presumed to have been made at that place, although the maker then resided in Florida, as was well known to the original holder, Morris, and to Stevenson, to whom it was subsequently transferred. The residence of the maker had not been changed when the note fell due, his domicile still being in Florida.

The indorser resided in Troy. It was not shown that he ever owned the note, or was under any other obligation for its payment than that of an ordinary indorser; and it may fairly be inferred from the case that the note was given for a debt due from the maker to Morris, and was indorsed for his benefit at the request of the maker.

Some months before the note fell due, the indorser had been asked by the then holder, Morris, if it would be paid at maturity, to which he replied that it would be; that his brother, the maker, would send the money to him, and he should see the note was paid. But on being requested to stipulate, absolutely, to pay the note himself, he declined to do so. It does not appear that on this or any other occasion, any thing was said as to the place where payment would be made, or where the note should be presented for payment at maturity.

Upon the evidence as stated in the case, I think it cannot be said that any thing has been done by the indorser to change or affect his original liability or his rights, in that character. He had not designated any particular place in Troy, or that city at large, as the place at which the note would be paid, or where demand should be made, nor had he been requested to designate any place for

that purpose. And although he certainly gave a strong assurance that the maker would remit the money to him, and therefore that the note would be duly paid, he at the same time refused to bind himself absolutely for its payment. He chose to leave his own responsibility where his contract and the law had placed it; and no one had a right to understand from what he said, that he intended to assume any new obligation, or to dispense with the performance of any act which the law required the holder of the note to perform. It does not appear to have been suggested on the trial, that the action was to be sustained on any such ground, nor was the judge requested to submit the question of a waiver of demand of payment, by the indorser, to the jury. It was doubtless then urged, as it was on the argument at bar, that this note was by law payable at Troy, and therefore the defendant had been duly charged as indorser, and not that he had in any manner waived a demand at the proper place.

What, then, is this case? A debtor, whose residence is in Florida, being at Troy, makes a note, which he dates at that place, to his creditor, a resident of this State, for an amount due to him, and procures a friend residing at Troy to indorse the same. No place of payment is specified in the note, nor is there any thing to indicate a place, unless that follows from the note bearing date at Troy. The holder knows the residence of the maker to be in Florida, but when the note falls due, instead of making demand of the maker personally, or at his residence or place of business in Florida, payment is demanded at Troy and not elsewhere. Was this a sufficient demand as respects the indorser? It clearly was, if the note was by law payable at that place, and it, as clearly, was not, if the note was payable elsewhere. This is the only question to be determined.

The date of a note at a particular place does not make that the place of payment, or at which payment should be demanded for the purpose of charging the indorser. This was expressly adjudged in the case of *Anderson v. Drake*, 14 Johns. 114. That was an action against the indorser of a promissory note, bearing date in the city of New York, but not made payable at any particular place. When the note was made, the maker lived in New York; but before it fell due he removed to Kingston in the county of Ulster. The counsel for the plaintiff insisted "that as the note was dated in New York, and the parties resided there at the time it was made, it must be presumed, no particular place being designated for the

payment, that it was payable in New York; that the removal of the maker from New York to any other place did not render it necessary for the holder to follow him for the purpose of demanding payment." But the Court thought otherwise, and held that a demand of the maker personally, or at his residence or place of business in Kingston, as in ordinary cases, was necessary, and that the indorser could not be charged upon a demand made in the city of New York, although the note bore date at that place. This I understand to be the settled and invariable rule where the maker has not removed from the State, but has a known residence within its limits. Where, after a note has been given, the maker absconds, removes into another State or country, or is without a fixed residence anywhere, other principles, as we shall see, apply: but in no case does the date of a note, of itself, make that the place where payment should be demanded in order to charge the indorser.

It has been supposed that the case of *Stewart v. Eden*, 2 Caines, 121, countenances a different doctrine. *Livingston, J.*, there said, "the note being dated in New York, the maker and indorser are presumed to have resided, and contemplated payment there." This remark was in part strictly correct, for the date of the note was presumptive evidence of residence: and in a general sense it may also be true that the date raises a presumption that the parties contemplated payment at that place. Judge *Livingston* did not say that the note was by law payable at the place of its date; on the contrary, the form of expression conclusively repels that idea. He was not speaking of what the parties were bound to do by the terms of the note, of their legal obligations flowing from their engagements as maker and indorser, but simply of what they were presumed to have contemplated. If the learned judge intended to affirm that a note, when no particular place of payment is otherwise indicated, is by law payable at the place where dated, he would have said so in direct terms, and would not have said it was to be presumed payment at that place was contemplated. This would have been absurd. But in truth the question whether the note in that case was payable where it bore date, was not before the Court, nor was it there pretended that payment had not been duly demanded. It was an action against the representatives of a deceased indorser, and although an objection was taken to the form in which the presentment for payment was alleged in the declaration, it was

not pretended by any one that the demand of payment had not been strictly correct. The main question in the case was, as to the sufficiency of the notice to the indorser, and the remark of the judge was made in discussing that point. I admit that upon the question of due diligence in giving notice to an indorser, it may have been very pertinent and proper to say that the parties are presumed to have contemplated payment at the place where the note was given and was dated, although such a remark would be altogether out of place in deciding upon the construction of an agreement, and whether the parties by its terms, were bound to make payment at a particular place. There is nothing therefore in this remark of Judge *Livingston* which can be made to countenance the idea that a note, when no other place of payment is specified, is by law payable at the place of its date. *Anderson v. Drake, supra*; *Bank of America v. Woodworth*, 18 Johns. 315, 322.

Where a promissory note is not made payable at any particular place, the general rule of law is, that in order to charge the indorser payment must be demanded of "the maker personally, or at his dwelling-house, or other place of abode, or at his counting-house or place of business." Story, Promissory Notes, § 235; *Bank of America v. Woodworth*, 18 Johns. 315; s. c., in error, 19 id. 391. But although such is the general rule, yet, under various circumstances, a demand in any form or manner may be dispensed with. It is a question of diligence, and if a demand is found to be impracticable, proper efforts for that purpose having been made, the indorser will still be held liable, due notice having been given to him by the holder.

Thus where the maker has absconded, that will ordinarily excuse a demand, and notice of the fact is sufficient to hold the indorser. 1 Ld. Raym. 443, 743; 3 Kent, 5th ed. 96; *Putnam v. Sullivan*, 4 Mass. 45, 53; *Lehman v. Jones*, 1 Watts & S. 126; *Chitty, Bills*, 10th Am. ed. 354, n. 1; Story, Promissory Notes, § 237.

Where the maker is a seaman on a voyage, having no domicile in the State, the indorser is liable without a demand being made. *Barrett v. Wills*, 4 Leigh, 114. But although the maker may be absent on a voyage, if he has a domicile in the State, payment must be demanded there. *Dennie v. Walker*, 7 N. Hamp. 199; *Whittier v. Graffam*, 3 Greenl. 82.

And in every case where the maker has no known residence or place at which the note can be presented for payment, the holder

will in like manner be excused from making any demand whatever. Story, Promissory Notes, § 237; Whittier v. Graffam, *supra*; Putnam v. Sullivan, *supra*; Duncan v. McCullough, 4 Serg. & Rawle, 480. But in all such cases, the reason for not making a demand must be shown on the trial of the cause. It must appear that the maker had absconded, was at sea, or had no known domicile or place where the note should be presented. The rule is strict, that a demand must be made, or a proper excuse shown for its omission.

There is a further exception to the rule requiring a demand to be made of the maker, or at his domicile or place of business; for where a note is made by a resident of the State, who, before it is payable, removes from the State and takes up a permanent residence elsewhere, the holder need not follow him to make demand, but it is sufficient to present the note for payment at the former place of residence of the maker. M'Gruder v. Bank of Washington, 9 Wheat. 598; ¹ Anderson v. Drake, *supra*; Dennie v. Walker, *supra*; Gillespie v. Hannahan, 4 M'Cord, 503; Reid v. Morrison, 2 Watts & S. 401; 3 Kent, 96. And this is just: for it is but reasonable to suppose that neither party, when the note was given, looked for a change of residence to a foreign country, and that each contracted upon the supposition that no such change would take place. Nevertheless, as was said in Dennie v. Walker, *supra*, "this is an exception to the general rule, and must be construed strictly." "We think," say the Court in M'Gruder v. Bank of Washington, *supra*, "that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law, than their abstract justice. On this point, there is no other rule that can be laid down, which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the indorser should stand committed, in this respect, by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held, in England, to stand committed."

These exceptions to the general rule, it will be seen, all rest on peculiar reasons. In one, the maker has absconded; in another, he is temporarily absent, and has no domicile or place of business within the State; in a third, his residence, if any he has, cannot be ascertained; while in the fourth, he has removed out of the

State and taken up his residence in another country. In each of these instances, let it be observed, the fact constituting the excuse, occurs subsequently to the making and indorsement of the note; and it is this new and changed condition of the maker, and that only, by which the indorser stands committed, without a regular demand.

We are, then, to inquire whether these exceptions are to be multiplied, and extended to a case where no change in the condition of either party has taken place; where the maker, when the note was made and indorsed, had a known residence in another State, and which had remained unchanged at the maturity of the note. It is palpable that this exception, if made, must be placed on some new principle; it cannot be allowed on the ground which upholds the others. The facts in this case are unchanged, and as the reason for making an exception does not exist, the exception itself should not be allowed. Unless, therefore, the general position is true, that one who indorses for a maker who lives in another State may be "held liable without any demand being made on the maker," I think the defendant was not liable in the case at bar. And if any such general rule of law, as I have stated, exists, it certainly may be shown; but that it has no existence, is, as I believe, not only according to the universal understanding amongst commercial men, but also according to the settled course of business in the commercial world.

The indorsement of a note is an order to the maker to pay the amount to the indorsee or holder, as is specified and agreed in the note, and an engagement by the indorser that if the note is duly demanded of the maker and not paid, or if it shall be found impracticable to make a demand, the indorser will himself, on receiving due notice, pay the amount to the indorsee or holder. Now, where such an order is drawn upon a maker who resides in another State, and which is well known to the person in whose favor the order is drawn, upon what principle can it be said that a demand of the maker is unnecessary? The indorsee voluntarily consents to take such an order, and why should he not perform the condition on which the ultimate liability of the indorser depends? I confess I see no reason why he should not. Here is no mistake, or misapprehension of fact, at the time the indorsement is made. The indorsee knows where the maker resides, and that it is in another State. He knows that by law, unless the intervention of a State line makes a difference, the maker must be

sought where he resides, and the demand must be made there. When the time for payment arrives, the maker is still at his former residence; the facts of the case are precisely as they were when the order was drawn. Why, in such a case, should the State line make a difference in the construction and legal effect of this contract of the indorser? It was fairly entered into between the parties; let it then be fairly observed and performed by them.

I can well understand why such an order made by an indorser upon the maker of a note *then residing within this State*, but who removes into another State before the note falls due, should receive a different construction, and that it would be unreasonable to require the holder to follow the maker to his new residence in order to demand payment. Here, a new and unlooked-for event has occurred, which, like the absconding of a maker, or an inability to discover his residence, may very reasonably be held to excuse a demand. In these respects, the indorser should be held to stand committed by the act of the maker. But where the facts, in reference to which the parties contracted, were fully known to them, and are in no respect changed, I am unable to discover any principle which will excuse the maker from making a demand, or using proper diligence to make a demand, as in ordinary cases. The intervention of a State line has, in my opinion, no possible bearing on the question.

I admit that I have not found any case in which this point has been expressly adjudicated, as I have stated it. It seems, however, to have been taken for granted, in the case of *McGruder v. The Bank of Washington*, already referred to. The case of *Duncan v. McCullough, Adm'r, &c., 4 Serg. & Rawle, 480*, was, in some of its features, much like the one at bar. It was an action against the administrator of an indorser of a note made by one Adams, bearing date at Baltimore, in Maryland, June 4, 1814, payable nine months from date, no place of payment being specified in the note. It did not appear otherwise, than by its date, where the note was actually made; and it may be inferred from the evidence, that Adams was, at that time, a resident at Green Village, Pennsylvania. It did not appear where he was when the note fell due, and no demand of payment had been made anywhere; nor was it shown that any search for the maker had been made. Here, then, was a note dated at Baltimore, no place of payment being stated in it, the maker living in another State. So

far it is the case in hand, yet it was not even suggested, by the counsel or the Court, that a demand was unnecessary, or that Baltimore was the proper place to make the demand. The case was disposed of on other grounds, and which could not have been in any respect material, if a demand at Baltimore would have been proper, or if none whatever was necessary. On the trial, the Court charged that the plaintiff was bound to prove a demand of payment of the maker, or due diligence used for that purpose, and upon this part of the case the final opinion of the Court was thus stated by Chief Justice *Tilghman* : “ If the plaintiff had proved that Adams had absconded, and was not to be found when the note fell due, a demand of payment would have been dispensed with, because it would have been impossible to make it. But no such thing was proved, and therefore a demand was necessary. The note being dated at Baltimore, would raise a presumption that Baltimore was the drawer’s place of residence, as was decided by the Supreme Court of New York, in 2 *Caines*, 127. Baltimore, then, was the place at which inquiry should have been made. The Court laid down the law fairly. A demand, or at least due diligence in endeavoring to make a demand, was necessary.” All this seems to me very just and proper. A demand was necessary : the note was dated at Baltimore, and if the residence of the maker was unknown, Baltimore was the place where the inquiry should have been made. But if, as is now urged, Baltimore was the place to demand payment, or, if no demand was required, the argument of counsel in the case referred to and the views of the Court were entirely wide of the mark. And here let me observe, that, although the date of a note does not make it payable at that place, still the date may, in one respect, be very important. It raises a presumption that the maker resides there, although it is only presumption. 3 *Kent*, 96, 97 ; *Lowery v. Scott*, 24 *Wend.* 358 ; *Galpin v. Hard*, 3 *M’Cord*, 394. And where it becomes a question of due diligence in seeking to make a demand, it may be all important to show that inquiry was made at the place where the note bears date. But here, this point is of no consequence, for the residence of the maker was known to all parties, and not the least effort was made to make demand of him where he lived, or at any other place than Troy, where the indorser resided, the maker then being at his home in Florida.

I am aware that Judge *Story*, in his treatise on Promissory Notes,

after adverting to various grounds on which a demand of payment may be excused, says: "It seems also, that if the maker of a promissory note resides and has his domicile in one State, and actually dates and makes, and delivers a promissory note in another State, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker cannot personally, upon reasonable inquiries, be found within the State, and has no known place of business there." § 236. For this he refers to the case of *Hepburn v. Toledano*, 10 Mart. La. 643. It will be observed that Judge *Story* does not give to this position the authority of his name and character; the point is stated doubtingly. It seems, he says, that under such circumstances the maker need not be sought in the State where he resides, and not that it is clear this will excuse the usual demand. The learned author was obviously doing no more than to state what seemed to him to have been decided in Louisiana, and he does it in a manner which precludes the idea that he intended to adopt the principle, or give to it any authority beyond that of the elevated and able tribunal by which the case was determined. I have looked at the report of the case of *Hepburn v. Toledano*. It was an action against the indorser of a promissory note dated at New Orleans, but not made payable there. When the note was payable the maker resided in Kentucky; but where his residence was when the note was given, is not expressly stated. The only question in the case, as the Court said, was whether the holder was obliged to go out of the State to demand payment; but whether that question arose upon a note given by a resident of Louisiana, who had subsequently removed to Kentucky, or by a person who lived in Kentucky when the note was made, is a fact upon which I cannot satisfy myself from any thing to be found in the report of the case. We have already seen that where the maker removes from one State to another, after the giving of a note, the holder need not follow him. This was said in *Anderson v. Drake*, in 14 Johnson, 114, upon the authority of which the Louisiana case was decided. In the latter case, the Court say: "There is some difficulty as to the place where demand is to be made, when the maker of a note or acceptor of a bill has been a resident of the State, and before the time of payment had changed his domicile; but if he lives in another country, the indorsee cannot be presumed to know his residence, and all that the law requires of the holder is due diligence at that place where

the note is drawn. Thus in the case cited by the appellant, 14 Johns. 116, it is stated by the Court to have been previously decided, that, where a note was dated at Albany, and the drawer of it afterwards removed to Canada, the demand where it was drawn was sufficient to charge the indorser." And it was held that the demand at New Orleans was sufficient. I must say that my impression upon this case is that the maker of the note had removed from Louisiana after the giving of the note ; but if the fact were otherwise, I think the decision should not be followed. The case is not strictly authority, although harmony in the decisions of the several State courts, upon such a point, is exceedingly desirable. But I cannot assent to the principle that where no change has taken place in the residence of the maker, between the making of the note and the time of its payment, the intervention of a State line dispenses with the necessity of making due demand of payment, or at all affects the question. I therefore think the nonsuit was right, and a new trial should be denied.

New trial denied.

See following case and note.

CHICOPEE BANK v. PHILADELPHIA BANK.

(8 Wallace, 641. Supreme Court of the United States, December, 1869.)

Payable at bank. Negligence of collecting bank.—Though commercial paper be physically in the bank at which it is payable, yet if the bank is ignorant of this by reason of the fact that the letter in which it was sent slipped through a crack in the cashier's desk and disappeared before it had been seen by him, then there is no presentment, even though the acceptor had no funds there, and did not mean to pay the bill. And such a disappearance carries a presumption with it of negligence in the collecting bank, and throws the burden of proof upon the bank to repel this presumption. In the absence of such proof, the bank is responsible to the holder for the amount of the bill or note.

THIS was a suit by the Seventh National Bank of Philadelphia against the Chicopee Bank of Springfield, Massachusetts, founded upon the allegation, that by reason of the neglect of the latter bank, the former lost its remedy against the prior parties on a bill of exchange ; to wit, the drawer and payee.

The bill was drawn by one Coglein, of Philadelphia, on Montague, of Springfield, payable to one Rhodes, of Philadelphia, for \$10,000, and accepted by Montague specially payable at the Chicopee Bank. The day of payment was Saturday, Feb. 18, 1865. On the 13th, Rhodes, the holder, indorsed the bill for value to the Philadelphia Bank, which sent it at once by mail, inclosed in a letter to the Chicopee Bank, to receive payment. The course of the mail between Philadelphia and Springfield is two days. On the 15th, this letter, with other letters and papers, was duly delivered by the postman, and placed on the cashier's table; but (as was afterwards ascertained) this letter slipped from the pile through a crack in the table, into a drawer of loose papers, and its presence in the bank was not known to the cashier, and as the two banks had no previous dealings, he was not expecting any thing from the other bank. On the 18th, Montague, the acceptor, made no attempt to pay the bill, either by calling for it or depositing funds, and subsequently, at the trial, made oath that he intended not to pay the bill, and had a defence against it. The cashier of the Philadelphia Bank, not receiving on the 17th an acknowledgment of the letter which he had sent on the 13th, felt somewhat anxious; and on the 18th consulted the president. On Monday, the 20th, he telegraphed to the cashier of the Chicopee Bank as follows:—

“Did not you receive ours of 13th instant, with Montague's acceptance, \$10,000?”

The despatch did not indicate either the time or place of payment of the draft; and the reply was sent,—

“Not yet received.”

This despatch was received by the cashier of the Philadelphia Bank at noon of the 20th. He testified at the trial that he wrote to Mr. Rhodes the same day, informing him of what he had learned, that he had no recollection of writing to Coglein, but, as he knew they were jointly concerned in dealings in petroleum lands, he presumed Rhodes would inform him. This was the only step the cashier took toward charging the prior parties. They both did business at that bank; Coglein was a director; both were frequently there, and well known to the cashier. As the mail required two days, and the 19th was Sunday, there was no question but the cashier had until and including the 24th, to give notice to Rhodes and Coglein. After the receipt of the reply of the 20th, at noon, he took no steps, by post or telegraph, to ascertain from the Chicopee

Bank whether the acceptor had or had not been ready to pay on the 18th. The Philadelphia Bank brought no suit against Rhodes or Coglin, but sued the Chicopee Bank for the amount of the note, on the ground that, by its negligence, they had lost the power to charge the prior parties.

The Court below instructed the jury that the prior parties were absolutely discharged by what took place at the Chicopee Bank, on the 18th ; that where a bill is accepted payable at a particular bank, the bank need not seek the acceptor, but that there must still be a presentment, in order to charge prior parties ; that the presence of the bill at the bank, ready to be delivered to the acceptor upon his tendering payment, was equivalent to a presentment, but that if the bill is not at the bank on the day of payment, ready to be delivered as aforesaid, there is a failure of presentment, and the prior parties are discharged, although the acceptor made no attempt to pay ; that in this case, therefore, the prior parties could not be held by any notice of whatever description, whenever or by whomsoever given ; and that if the loss or mislaying of the bill during the whole of the 18th was owing to the negligence of its cashier, the Chicopee Bank was liable for the amount of the note.

After the charge was fully delivered, the Court was asked by the counsel of the Chicopee Bank to instruct the jury as to the burden of proof. This the Court refused to do, considering that it had already sufficiently instructed the jury.

The verdict and judgment were accordingly for the plaintiffs.

NELSON, J. The case was put to the jury, whether or not the loss of the bill, and consequent inability of the collection bank to take the proper steps against the acceptors to charge the prior parties, was attributable to negligence, and want of care on the part of the Chicopee Bank, and that, if it was, the bank was responsible. The jury found for the plaintiffs.

In cases where the drawee accepts the bill, generally, in order to charge the drawer or indorser, the holder must present the paper, when due, at his place of business if he has one, if not, at his dwelling or residence, and demand payment ; and, if the money is not paid, give due notice to the prior parties. If he accepts the bill, payable at a particular place, it must be presented at that place, and payment demanded. In these instances, as a general rule, the bill must be present when the demand is made, as in case of payment the acceptor is entitled to it as his voucher. When the

bill is made payable at a bank, it has been held that the presence of the bill in the bank at maturity, with the fact that the acceptor had no funds there, or, if he had, were not to be applied to payment of the paper, constitute a sufficient presentment and demand; and, if the bill is the property of the bank, the presence of the paper there need not be proved, as the presumption of law is, that the paper was in the bank, and the burden rests upon the defendant to show that the acceptor called to pay it.¹

In the present case, it is argued that the bill was in the Chicopee Bank at the time of its maturity, and, as the acceptors had no funds there, a sufficient presentment and demand were made, according to the law merchant. It is true, the bill was there physically, but, within the sense of this law, it was no more present at the bank than if it had been lost in the street by the messenger on his way from the post-office to the bank, and had remained there at maturity; and this loss, which occasioned the failure to take the proper steps, or rather, in the present case, to furnish the holder with the proper evidence of the dishonor of the paper, so as to charge the prior parties, and enable him to have recourse against them, is wholly attributable, according to the verdict of the jury, to the collecting bank. In the eye of the law merchant there was no presentment or demand against the acceptors; and, as a consequence of this default, the holder has lost his remedy against the drawer and indorser, which entitles him to one against the defendant. The radical vice in the defence being the failure to prove a presentment and demand upon the acceptors at the maturity of the bill, the question of notice is unimportant.

But if it had been otherwise, the notice itself was utterly defective. That relied on is the answer of the defendant to the telegram of the plaintiff of the 20th February, which was, that the bill had not yet been received. This was after its maturity, and it simply advised the holder and payee indorser, to whom the information was communicated the same day, that the drawer and indorser were discharged from any liability on the paper. It showed that the proper steps had not been taken against the acceptors to charge them.

Some criticism is made upon the refusal of the Court below to charge as to which side the burden of proof belonged, in respect to the question of negligence and want of care, after the paper came

¹ Fullerton *v.* Bank of United States, 1 Peters, 604; Bank of United States *v.* Carneal, 2 id. 543; Seneca Co. Bank *v.* Neass, 5 Denio, 329; State Bank *v.* Napier, 6 Humph. 270; Folgar *v.* Chase, 18 Pick. 63.

into the hands of the defendant. No objection is taken to the charge itself, upon this question, and, indeed, could not have been, as the point was submitted to the jury as favorably to the defendants as could have been asked. We think the Court, after having submitted fairly the evidence on both sides bearing upon the question, had a right, in the exercise of its discretion, to refuse the request.

If, however, the Court had inclined to go further, and charge as to the burden of proof, it should have been that it belonged to the defendant. The loss of the bill by the bank carried with it the presumption of negligence and want of care; and, if it was capable of explanation, so as to rebut this presumption, the facts and circumstances were peculiarly in the possession of its officers, and the defendant was bound to furnish it. Where a peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or damaged while in his custody, the presumption is that the loss or damage was occasioned by his negligence, or want of care of himself or of his servants. This presumption arises with respect to goods lost or injured, which have been deposited in a public inn, or which had been intrusted to a common carrier. But the presumption may be rebutted.¹ *Judgment affirmed.*

Adams v. Leland, 30 N. Y. 309, is an additional authority on the point stated in the opinion in the principal case, Taylor v. Snyder, that where a note is made by a resident of a State, who, before it matures, removes from the State and takes up a permanent residence elsewhere, the holder need not follow him to present the note for payment. See also, to the same effect, Foster v. Julien, 24 N. Y. (10 Smith) 28.

The question arose in Pearson v. Bank of Metropolis, 1 Peters, 89, in 1828, whether parol evidence could be received of an agreement of all the parties to a note that demand of the maker might be made at a certain place, — no place of payment being specified on the face of the note. The Court held the evidence admissible. Marshall, C. J., in delivering the opinion, said: "The plaintiffs in error contend that the testimony ought not to have been admitted, because it is an attempt, by parol proof, to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand at a stipulated place, instead of a demand on the person of the maker; and this does not alter the instrument, so far as it goes, but supplies extrinsic circumstances which the parties are at

¹ Dawson v. Chamney, 5 Q. B. 164; Coggs v. Bernard, 2 Ld. Raym. 918; Day v. Riddle, 16 Vt. 48.

liberty to supply. No demand is necessary to sustain a suit against the maker. His undertaking is unconditional, but the indorser undertakes conditionally to pay, if the maker does not; and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes only when they are silent."

A contrary doctrine is held in *Pierce v. Whitney*, 29 Me. (16 Shepl.) 188, citing *Story, Promissory Notes*, § 49, and note; but *Pearson v. Bank of Metropolis*, *supra*, is not noticed in either place. And Mr. Justice *Story*, in support of his position, refers to the rule that parol evidence is not admissible to vary the terms of a written contract; a rule which Chief Justice *Marshall* very clearly shows is not infringed by the decision which he pronounces.

Thompson, C. J., in *Anderson v. Drake*, 14 Johns. 114, decided in 1817, also makes the statement that parol testimony is inadmissible to show such an agreement; disapproving a *dictum* to the contrary in *Thompson v. Ketcham*, 4 Johns. 285; but his statement was also a *dictum*: that point not being involved in the case.

In *State Bank v. Hurd*, 12 Mass. 171 (1815), the note was made payable at the State Bank. By direction of the maker and indorser, notices were left at a certain shop for the promisor and for the indorser, the defendant. No other notice or demand was given or made. It was held that the agreement that notice left for the maker at the shop should be equivalent to a more formal demand upon him, removed the necessity of making demand at the bank, and the indorser was liable.

And it is held in *Sussex Bank v. Baldwin*, 2 Harrison, 487 (1840), that the indorser cannot object to presentment made at an improper place, where the maker alone had directed the holder to present the note at such place. But this may be doubted. The reason given in that case is this: The *maker* is estopped from objecting by his conduct; "and that which is good against the *drawer* is good against the indorser." The proposition in quotation marks may be generally true, so far as presentment is concerned; but a drawer is not a maker. The drawer's liability is that of an indorser, while the maker's liability is absolute. The Court evidently confused the terms maker and drawer.

On this point *State Bank v. Hurd*, *supra*, was cited; but there is this material difference between the two cases, that in the former the indorser and maker together gave the directions; while in the latter case the indorser was not privy to the matter; at least it is not stated that he knew any thing of it. And the ground taken in *Pearson v. Bank of the Metropolis*, *supra*, was that it was an agreement of *all the parties*.

With respect to the place at which presentment should be made, it is not sufficient to charge an indorser that it was made in the street. When a bill is payable generally and not at a specified place, demand must be made at the place of business of the maker or acceptor, if he has one; if not, at his residence. *King v. Holmes*, 11 Penn. State, 456. But it was held in this case that if the notary, on his way to the acceptor's place of business, meets him in the street and informs him of his business and where he is going, and the acceptor offers, if he will go to his

place of business, to give him only a check on a broker, it is not necessary for the notary to proceed farther. The demand at the place of business is waived.

In *Sussex Bank v. Baldwin*, *supra*, the Court, *Dayton, J.*, say that there is "no doubt where a person has an office or known and settled place of business for the transaction of his moneyed concerns, whether he be a banker, broker, merchant, manufacturer, mechanic, or dealer in any other way, a presentment and demand at that place" as well as at his residence, will be effectual. "It must not, however, be a place selected and used temporarily for the transaction of some particular business, as settling up some old books or accounts merely, but his regular and known place of business for the transaction of his moneyed concerns. The counting-room of a banker or merchant may be a proper place for a demand, though the manufactory or workshop would not. Yet if the manufacturer or mechanic have an office or known place of business for the purpose aforesaid, a good demand may be made there."

In *West v. Brown*, 6 Ohio State, 542, it was contended that demand should have been made at the maker's residence, since he had no well-established place of business. But he had a room at which he received business calls, and where he directed them to be made. Demand was there made, and it was held sufficient, though the same office was occupied as a place of business by other persons.

And if the maker or acceptor had neither place of business nor residence in the city in which the paper is payable, it is sufficient to charge an indorser or a drawer that the holder was there on the day of payment, ready to receive the money. *Boot v. Franklin*, 3 Johns. 207, *Kent, C. J.*; *Mason v. Franklin*, 3 Johns. 202; *Malden Bank v. Baldwin*, 13 Gray, 154. See also *Stivers v. Prentice*, 3 B. Mon. 461; *Deyraud v. Banks*, 16 La. 461; *Shamburgh v. Commagere*, 10 Mart. La. 18.

The result of the cases seems to be that if the maker or acceptor of paper payable at no designated place has a regular place of business and an office, demand should there be made to charge the indorser, otherwise the demand should be made at his residence.

Where the bill or note is payable at a particular bank or other place certain, in order to charge an indorser, "it is well settled, not only that the holder is not bound to present it to the promisor at any other place, but that a presentment at any other place would be unavailing." Per *Shaw, C. J.*, in *North Bank v. Abbot*, 13 Pick. 465. See also *Bank of the United States v. Smith*, 11 Wheat. 171; *Watkins v. Crouch*, 5 Leigh, 522; *Shaw v. Reed*, 12 Pick. 132; *Bank of the United States v. Carneal*, 2 Peters, 543.

If the bank at which the paper is payable is owner of the same, all that "ought to be required is that the books of the bank should be examined, to ascertain that the maker had any funds in their hands; and, if not, there was a default which gave to the holder a right to look to the indorser for payment." If the maker had any balance standing to his credit, "the bank would have a right to apply it to the payment of the note, and no default would be incurred by the maker, which would give a right of action against the indorser." Per *Thompson, J.*, in *Bank of the United States v. Smith*, *supra*. See, to the same effect, *Bank of South Carolina v. Flagg*, 1 Hill (S. C.), 177. But this is matter of defence, and need not be alleged in the declaration. *State Bank v. Napier*, 6 Humph. 270.

A bill of exchange may be accepted payable at a particular place in the city

or town in which the acceptor resides, though it be not his place of business. *Troy City Bank v. Lauman*, 19 N. Y. (5 Smith) 477.

But it cannot be made payable by the acceptance in a city or town other than that of the acceptor's residence (the bill itself not stating such place of payment?) so as to charge the drawer or indorser by presentment at the place named in the acceptance. *Niagara District Bank v. The Fairman, &c., Manufacturing Co.*, 31 Barb. 403; *Rowe v. Young*, 2 Brod. & B. 165; *Walker v. Bank of New York*, 13 Barb. 636. But see *Mason v. Franklin*, 3 Johns. 202, in which the bill was drawn on a person in Liverpool, payable in London, and protested for non-acceptance and non-payment in the former place. *Kent*, C. J., said: "We are of opinion that, as no place of payment in London was designated, the demand for payment and protest for non-payment were well made upon the drawees personally at Liverpool."

It is said that, when the payor of commercial paper has become insolvent before its maturity, and has absconded from the State and gone into parts unknown, there must be a presentment and demand of payment at his last place of business or of residence, or due efforts should be made to find the one or the other, in order to charge the indorser. *Grafton Bank v. Cox*, 13 Gray, 503. But this statement does not seem to be strictly accurate; and the learned judge perhaps had in mind the case of an ordinary removal by the payor into another jurisdiction. It would seem from the language of the rule stated in *Reid v. Morrison*, 2 Watts & S. 401, that the party need not have left the State to dispense with presentment. *Sergeant*, J., says on p. 405: "The rule of law on this subject seems to be that, if the drawee has merely removed from his usual place of residence to another in the same State or kingdom, it is incumbent on the holder to make every reasonable endeavor to find out whether he has removed, and, in case he succeed in such attempt, to present the note or bill for payment at that place. But if the drawee or maker has absconded, that circumstance will dispense with the necessity of making any further inquiry after him," citing *Chitty, Bills*, 261; *Bayley*, 95; *Duncan v. McCullough*, 4 Serg. & R. 480.

The connection of the two sentences indicates that the learned judge regarded as immaterial the place to which the payor had absconded; whether he had left the State or not. At any rate, it seems highly probable that if he had thought that there was such a distinction, he would have mentioned it. And there seems to be no solid ground for the distinction. An absconding debtor always endeavors to cover up his tracks, and usually succeeds in doing so; and how can it be determined whether or no he has left the State? Shall the holder wait in the probably vain endeavor to ascertain whether the payor has passed the jurisdiction, in order to determine whether he must make presentment at the debtor's last place of residence? Such a requirement would be unreasonable, if not absurd. If the absconding is any excuse at all, it should be so without reference to the locality of the hiding-place, unless this is within the jurisdiction and the holder knows where it is. In such a case it would certainly be his duty to present the paper at the debtor's residence or place of business. But this is not the case stated in *Grafton Bank v. Cox*, *supra*. That case speaks of an absconding "into parts unknown."

This view is confirmed by *Duncan v. McCullough*, 4 Serg. & R. 480. *Tilghman*, C. J., said: "If the plaintiff had proved that Adams had absconded

and was not to be found when the note fell due, a demand of payment would have been dispensed with, because it would have been impossible to make it." There was evidence that Adams had been seen in the State, and none that he had left the State. And *Lehman v. Jones*, 1 Watts & S. 126, directly decides the point that presentment in such case need not be made at the payor's last abode. See also *Foster v. Julien*, 24 N. Y. (10 Smith) 28, 37; *Ratcliff v. Planters' Bank*, 2 Sneed, 425, 555; *Hale v. Burr*, 12 Mass. 85, 89; *Gist v. Lybrand*, 3 Ohio, 307; *Shaw v. Reed*, 12 Pick. 132; *Bruce v. Lytle*, 13 Barb. 163; *Edwards, Bills*, 485-487, and note; 1 *Parsons, Notes and Bills*, 449, 450. But *Pierce v. Cate*, 12 Cush. 190, declares a more strict rule than that held in the early Massachusetts cases. It is there held that where the maker of a note absconds, leaving no visible property that may be attached, a want of demand or *inquiry for him* is not thereby excused, though the indorser knew of the absconding. Opinion by *Shaw, C. J.* It is not stated, however, in the report that this point was argued; and it is said in 1 *Parsons, Notes and Bills*, 450, note, that "it is a fact personally known to us that this point was not argued, nor indeed raised by counsel in this case. The defence was based upon other grounds." See *Story, Promissory Notes*, §§ 205, 237; *Chitty, Bills*, 280, 330, 367.

A very different question arises in the case of a mere removal by the payor into another jurisdiction; but there is conflict upon the necessity of presentment at the debtor's last abode, even in this case. The general rule is well settled that in such case the holder need not follow the maker or acceptor into another State; but the question is, must he still make presentment at the payor's last place of residence? *Wheeler v. Field*, 6 Met. 290, *Wilde, J.*, holds the affirmative. *Gist v. Lybrand*, 3 Ohio 308, and *Foster v. Julien*, 24 N. Y. (10 Smith) 28, *Mason, J.*, dissenting, held the negative. *Reid v. Morrison*, *supra*, says that the rule which applies in the case of an absconding debtor, applies equally in the case of the removal of the payor into another State. *M'Gruder v. Bank of Washington*, 9 Wheat. 598, merely decides that in case of such removal, presentment at the maker's last abode is sufficient; but it does not hold that it is necessary. That point was not involved in the case. In 3 *Kent, Com.* 96, the rule is stated in the same way. It is there said: "If he [the payor] has removed out of the State, subsequent to the making of or accepting the bill, it is *sufficient* to present the same at his former place of residence."

The reason of requiring presentment at the payor's last residence, is probably that he may have provided and left funds there for the payment of the paper; which is indeed a strong argument for the requirement, and seems sufficient to decide the question in the case of an honest removal. It wholly fails, however, in the case of an absconding debtor; such a person is not apt to leave funds with which to pay his debts. See note to *M'Gruder v. Bank of Washington*, *post*.

PAYMENT.

[THE subject to be illustrated here, in regular course, is the extinguishment of a bill or note by payment. Commercial paper received in payment of debt will be considered under *BANK BILLS, post*; and the effect of releases, extension of time, &c., will be considered under *DISCHARGING INDORSER, post*.]

JOHN WHEELER v. ALBERT H. GUILD *et al.*

(20 Pickering, 515. Supreme Court of Massachusetts, October, 1838.)

Payment to one not authorized to receive it and before maturity. — The plaintiff, holder of a note indorsed in blank, delivered it to B. and G., attorneys in partnership, to be held by them as collateral security for the payment of certain debts due from the plaintiff to B. and G., and other persons; and the note was placed among the private papers of G., by whom the business was transacted. Some time after payment of the debts so secured, but before the maturity of the note, the maker paid to B. the amount due on the note, exclusive of interest, and took therefor a receipt signed by B. alone, setting forth that it was in full payment of the note, and that the note was to be delivered up to the maker. *Held*, that as the note was not in fact delivered up to the maker, and as the right of B. and G. to transfer or collect the note had ceased upon payment of the debts for which it was pledged, and as the note was paid before maturity, the payment to B. did not operate as a discharge of the note; and that the plaintiff might, notwithstanding such payment, recover the amount from the maker.

THE case is stated in the opinion of the Court.

SHAW, C. J. The facts of this case present a very important question for the consideration of the Court. Whatever affects the negotiability, and the free currency of promissory notes and bills of exchange, is of the utmost importance to a mercantile community, the business of which is to a great extent transacted through the medium of these instruments.

The facts which may be deemed material are these. The plaintiff became the holder of the note in question by regular indorsement for valuable consideration, soon after it was made, being a note dated September 1, 1833, payable in three years, with interest,

and the last indorsement being in blank. Within a year from the date of the note, to wit, in March, 1834, the plaintiff, John Wheeler, as surety, joined with Daniel G. Wheeler in three promissory notes, one to Brigham and Goodrich, attorneys and partners, in Worcester, one to Tappan & Co., and one to Stewart & Co., of New York, for both of which parties Brigham and Goodrich were agents and attorneys. On that occasion, the plaintiff, John Wheeler, delivered to Brigham and Goodrich, as collateral security to his three joint and several promises, the note in question, indorsed in blank, and took their receipt, specifying that it was so received, and to be by them held, as collateral security for the payment of those notes. In September, 1835, these three notes had been fully paid. Though Brigham and Goodrich were in partnership as attorneys-at-law, yet Brigham was engaged in much other business, and had many separate negotiations, and the business in question had been done in the partnership name, but in fact by Goodrich. In December, 1835, the plaintiff applied to Goodrich for the note, who then produced and exhibited it from a file of private papers, where it had been kept by him, and he would then have given it up to the plaintiff, but the plaintiff had not his receipt with him, to exchange for it. In the mean time, before this application of the plaintiff to Goodrich, viz., on the twenty-eighth of November, 1835, Brigham had received of Stafford, one of the firm of A. H. Guild & Co., and one of the defendants, \$500 to pay the note in question, describing it as a note payable in September, 1836, and gave him a receipt, in his separate name, signed D. T. Brigham, stating that the \$500 had been received in full payment of the note, and the note to be delivered up to Stafford. Soon after the application of the plaintiff to Goodrich above stated, viz., about the twenty-fourth of December, Stafford, one of the defendants, producing Brigham's receipt, applied to Goodrich for the note, who declined giving it, on the ground that Brigham had no right to receive pay for, and discharge the note, and by mutual consent it was placed in the custody of a gentleman, for the use of the party having the better title to it, by whom it was produced in this Court on the trial.

Some inferences are to be drawn from this evidence, which may have a bearing on the case ; but we think they are plainly deducible from the circumstances stated, and they are these : that Goodrich did not assent to the payment received by Brigham, and did not in fact know of it till after he had been applied to by the plaintiff for

the note ; that Goodrich had the actual possession and custody of the note, and that at the time that Brigham received the money and gave the receipt, he not only did not produce or exhibit the note, but that he had not the actual custody of it, nor was it so amongst the partnership papers, as that it was in the actual joint custody of the parties as partners. If he had it in his possession, or had regular access to it, in the ordinary way of business, there is no reason why he did not deliver it up to Stafford, instead of giving him a receipt, and a promise to deliver it.

The law in regard to bills of exchange and promissory notes is so framed as to give confidence and security to those who receive them for valuable consideration, in the ordinary course of business, when payable to bearer or indorsed in blank, so as to be transferable by delivery ; and in general a party taking such a bill under such circumstances, has only to look to the credit of the parties to it, and the regularity and genuineness of the signatures and indorsements. So that if such a bill or note be made without consideration, or be lost or stolen, and afterwards be negotiated to one having no knowledge of these facts, for a valuable consideration and in the usual course of business, his title is good and he shall be entitled to receive the amount. *Miller v. Race*, 1 Burr. 452 ; *Peacock v. Rhodes*, 2 Doug. 633 ; *Grant v. Vaughan*, 3 Burr. 1516. The credit which the law thus attributes to notes and bills of exchange which are transferable by delivery, arises mainly from the confidence inspired by the actual custody and possession, and the actual delivery of the security upon such negotiation. To so great an extent is this principle carried, that in regard to bank-notes, and in most respects in regard to all other bills and notes transferable by delivery, the title and the possession are considered to be inseparable. And it will be presumed that the party thus in possession of a bill holds it for value, until the contrary appears ; and the burden of proof is on the party impeaching his title. *Collins v. Martin*, 1 Bos. & Pul. 648.

But these rules are adopted with this limitation, that the party thus taking the note or bill does it in the ordinary course of trade, when not overdue or otherwise dishonored by any thing apparent upon the face of it, and without notice that it had been lost or stolen, or that the holder had obtained it wrongfully, or had no just right to receive it in the way of business. *Paterson v. Hardacre*, 4 Taunt. 114. If one takes a note or bill with actual notice that it

has been lost by the owner, he cannot hold it against the true owner. *Lovell v. Martin*, 4 Taunt. 799.

It has been argued that where a party has a legal title by indorsement and delivery, and the actual possession of the bill or note, although he holds without any just right to negotiate or collect it, still as he has a legal title, a transfer from him will vest a legal title in another, and authorize such other to take for his own use. But this consequence, we think, does not follow. The true ground is expressed by *Eyre, C. J.*, in the case above cited, *Collins v. Martin*. He says, "for the purpose of rendering bills of exchange negotiable, the right of property passes with the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods." In another part of his judgment, in assigning the reason why a person thus having a legal title may not enforce the collection of the bill, whether he has given value for it or not, he says: "If it can be proved that the holder gave no value for the bill, then he is in privity with the first holder, and will be affected by every thing that affects the first. This all proceeds upon an *argumentum ad hominem*. It is saying, you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience." The same reasoning applies to other cases, where a party has the custody of a bill, without any just right or lawful authority to collect or negotiate it, as where it has been lost or stolen, or embezzled from the true owner, or intrusted to an agent, for a special purpose only; if these facts are known to the party receiving it, he is in privity with the party from whom he receives it, and cannot be heard in a court of justice, though having a legal title to enforce an inequitable and unjust demand. Such a case is not within the reason of the rule, which is designed only to protect bills and notes, when taken in good faith, in the course of business. If a note is paid, not in the usual course of business, or to a person having the custody, but not authorized to receive payment, and that known to the party paying, though the note be given up, it is no discharge against the true owner. *Kingman v. Pierce*, 17 Mass. 247.

So payment of a bill or check, before it is due, will not be a discharge unless made to the real proprietor of it; and therefore where a banker, contrary to usage, paid a check the day before it bore date, which had been lost by the payee, it was held that he was lia-

ble to repay the amount to the person losing it. *Da Silva v. Fuller*, Sel. Cas. 238, cited in Chitty, Bills (6th Eng. ed.) 148. In this case, although the holder had the legal title arising from the possession of the check; yet he was not *bona fide* the holder with authority to collect, and as the banker paid it out of the usual course of business, he paid it at the risk of being obliged to pay it again, if the party presenting it had not just right to receive it.

Most of the same principles and reasons apply alike to transfers and to payments. We think the rules deducible from the cases are these: where a party takes a bill transferable by delivery, not overdue nor otherwise apparently dishonored, for valuable consideration, in the usual course of business, and without notice, actual or constructive, that the holder came by it unlawfully or without title, and has no just right to collect and receive it, the party taking it shall hold it as a valid security, notwithstanding that it has been lost by the true owner, or stolen from him, or taken by the holder as a mere agent to keep, or for other special purpose, without any authority to collect or transfer it, otherwise he shall not be deemed to have a good title to hold and enforce payment of it, or to withhold the bill itself or the proceeds of it, from the party justly entitled. *Bleaden v. Charles*, 7 Bing. 246. The same rule applies to payments; if a bill be paid at maturity, in full, by the acceptor, or other party liable, to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good. But in both cases faith is given to the holder, mainly on the ground of his possession of the bill, ready to be surrendered or delivered, and the actual surrender and delivery of it upon the payment or transfer. If, therefore, upon such payment, the holder has not the actual possession of the bill ready to be delivered, and does not in fact surrender it, but gives a receipt or other evidence of the payment; and if it turns out that the party thus receiving, had not a good right and lawful authority to receive and collect the money, but that another person had such right, the payment will not discharge the party paying, but will be a payment in his own wrong; he must pay the bill again to the right owner, and must seek his redress against the party receiving his money, on the pretence that he had a right to receive it as the holder of the bill, when in fact he had no such right.

Applying these principles to the present case, the Court are of opinion, that the payment made by Stafford to Brigham, under the circumstances, did not operate as a payment and discharge of this note, and that the plaintiff is entitled to recover.

The plaintiff was the holder of this note by indorsement, before it was pledged to Brigham and Goodrich, and had the complete legal and equitable title to it, and the whole beneficial interest in it. Being transferable by delivery, when transferred to Brigham and Goodrich, they took the legal title, with a right to collect it, and apply the proceeds to the payment of the notes, for the security of which it was pledged, if they should not be otherwise paid. But when those notes were paid, all right of Brigham and Goodrich to transfer or collect it ceased, and they had the mere naked possession of it for the plaintiff, to be surrendered on demand. Now whatever might have been the effect of an actual surrender and delivery of this note to one of the promisors, on receiving payment, it is very clear that, according to all the rules applicable to this subject, without surrendering and delivering up the note, the payment must be considered as made at the risk of the party paying; and as the party receiving in fact had no right to receive payment, such payment and receipt did not discharge the note, as against the true owner. It is not necessary to consider whether Brigham was acting in his partnership capacity or not; because after the purpose was accomplished, for which the note was pledged to the partners, they had no just right or lawful authority to transfer or collect the note, as against the plaintiff. If they had jointly transferred it in the due course of business, although their transfer without notice might have held it, it would be in virtue of the law which protects such transfers to a party without notice, in order to give effect to the currency of bills and notes, and not because Brigham and Goodrich had any right or lawful authority. If therefore they had given a transfer in writing with a promise to deliver the note, not delivering or producing it, no title would have passed as against the plaintiff, because such transfer without delivery would not be within the reason or principle of the rule.

But we think the other point is equally decisive. Brigham not only did not produce or exhibit the note, but he had not the actual custody or possession of it. He did not profess to act for the partnership, but signed the receipt in his own name. Had Brig-

ham and Goodrich, as partners, been the true holders of the note, or if they had had a joint authority to collect it, it may well be admitted, that the act of one or the receipt of one would bind both. But all the right and authority which they ever had over the note, except to give it back to the plaintiff, agreeably to their contract, had ceased. A receipt of one therefore in his own name and not purporting to be for the use of both, was not within the scope of the partnership authority, and did not bind his partner. The defendant Stafford gave credit to Brigham only. For though his receipt purports to be, not merely executory, but a present discharge of the note, yet as he had no authority to discharge it, either by himself, or for himself and partner, and as he had not the note to surrender and give up, the legal effect and operation of his receipt was, an executory undertaking, that he would procure a discharge of the note and surrender it. The consequence is, that Stafford paid his money to the wrong person, and must look to him for an indemnity.

Besides, the note was not paid in the due course of business. It was paid many months before it was due: the full sum was not paid, there being more than two years' interest due on the notes, which was wholly relinquished: no notice was given to Goodrich, the partner who transacted the business of taking these notes, and giving the receipt for them, and who had the actual custody of this note, all of which would be strong evidence to go to a jury, to establish the fact of constructive notice to Stafford, that Brigham had no right, either in his own name or as a partner with Goodrich, to receive payment of, or to discharge this note. But the other grounds are sufficient, without relying upon these circumstances.

The grounds upon which the Court place their judgment are these: The plaintiff had once a good title to the note. It was delivered to Brigham and Goodrich, for a special purpose, which was accomplished. After that, Brigham and Goodrich had a mere naked custody of the note for the plaintiff and had no right or lawful authority either to negotiate or collect it: *a fortiori*, Brigham alone had no such authority. The defendant Stafford was not lawfully called upon to pay Brigham, as having the possession and custody with a *prima facie* title, because he had no such custody or possession, and the note was not due. Stafford was not deceived into taking the note by the production and delivery of it,

because it was not delivered or produced ; if he paid it therefore to Brigham, without having [taken] up his note, he did it on the faith that Brigham had good right to receive payment and discharge it, and of course under the liability to pay it over again to the rightful proprietor if Brigham had not such right. In fact and law, Brigham had no such right, but the plaintiff was at the time the rightful proprietor, and of course the defendants obtained no discharge by such payment, but upon the maturity of the note they were bound to pay it to the plaintiff. The note having been put by Mr. Goodrich into the hands of a common friend, for the use of the party entitled, and the plaintiff having shown himself entitled, the note was rightly brought in by the person to whom it was thus intrusted, as evidence for the plaintiff.

Judgment for plaintiff.

The rule then is, in the case of negotiable paper, that the promisor is not discharged, *first*, if he pays to one not entitled to receive payment ; or, *secondly*, if he pays before the maturity of the paper, unless payment is thus made to the real holder and the paper surrendered, or unless the indorsee was informed of the payment before he took the paper. See *White v. Kibling*, 11 Johns. 128 ; *Hortsmann v. Henshaw*, *ante*, p. 57, and note ; *Dod v. Edwards*, *infra*.

The learned judge who delivered the opinion seems to lay considerable stress upon the circumstance that the note was not surrendered to the maker when he made the payment to the agent ; but this was, perhaps, to show more clearly the want of authority in the latter to grant a discharge, and not that the delivery of the note would have aided the plaintiff's case. The other objection, that the payment was made before maturity, would still have been in the way. See *Eckert v. Cameron*, 43 Penn. State, 120 ; *De Silva v. Fuller*, Chitty, Bills, 392 ; *Griswold v. Davis*, 31 Vt. 390 ; *Morley v. Culverwell*, 7 Mees. & W. 174 ; *Burridge v. Manners*, 3 Camp. 193 ; *Story*, Bills of Exchange, § 417.

So it is no defence to an action by an indorsee against the acceptor of a bill, that the drawer, who had made the bill payable to his own order, had given the acceptor a general release before his own indorsement, unless it is shown that the indorsee knew of the release. *Dod v. Edwards*, 2 Car. & P. 602, per Lord *Tenterden*.

It is held that, in an action against the acceptor, evidence is admissible to show that the person who indorsed the bill in question as payee was not the real payee, though he had the same name. *Mead v. Young*, 4 T. R. 28. In this case, *Ashurst, J.*, said : " In order to derive a legal title to a bill of exchange, it is necessary [for the holder] to prove the handwriting of the payee ; and therefore, though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet his indorsement will not confer a title." *Buller, J.*, said : " I am of opinion that it is incumbent on a plaintiff who sues on a bill of exchange to prove the indorsement of the person to whom it is really payable. Here it is clear that the indorsement was not made by the

same H. Davis to whom the bill was payable, and no indorsement by any other person will give any title whatever."

A creditor, residing in Mendota, Ill., requested his debtor, residing in New York, to send him the amount of his debt "in a check on the Marine Bank of Chicago, or any other way that is safe." The bill was drawn payable to the order of the creditor, without any further description, either by stating his residence, or otherwise designating him. By a mistake of the debtor, the bill was directed to La Salle, Ill., instead of to Mendota, at which place there resided a person of the same name as that of the creditor, the payee of the bill. The mistake, however, was corrected, and the letter sent to Mendota; but it was delivered to this other person instead of to the creditor. He sold the draft to one who had no notice of the facts, and it was paid in the usual and regular course of business. The creditor after this payment assigned his interest to the plaintiff, who sued the acceptors in trover; and the Court held him entitled to recover; *Roosevelt, J.*, dissenting. *Selden*, and *Strong, JJ.*, expressed no opinion. *Graves v. American Exchange Bank*, 17 N. Y. (3 Smith) 205. Mr. Justice *Roosevelt*, in his dissenting opinion, said: "The payee had no designation but his name; none at all events was given by the drawer. The bank in good faith paid the draft to a person presenting it with the indorsement of Charles F. Graves, a genuine indorsement, but not the indorsement, it is said, of the genuine Graves. Which of the two, under these circumstances, should bear the loss; the drawer who carelessly omitted all designation, or the drawee who innocently paid the wrong person in consequence of such omission? As between these parties, the loss, it seems to me, should fall on the former. Nor do I perceive that the payee, the *quasi* assignee of the drawer, occupies any better position than his assignor. Hurd was his debtor, and bought the draft to remit in payment of the debt. Hurd directed the form. He did nothing to supply the drawer's omission, but aggravated the error by another of his own; he mailed the draft to Charles F. Graves, La Salle, Ill., intending it, he says, for Charles F. Graves, Mendota, Ill., the two places being only fifteen miles apart. . . . He thus by his own act put the draft into the hands of the La Salle Graves, and held out the La Salle Graves as the real payee. Can he complain, then, that the Exchange Bank recognized his indorsement? Must they pay twice because he, after 'full warning' as he admits, chose to be careless of his own interests?"

If the drawer put a bill into circulation bearing a forged indorsement of the payee, and the acceptor pay the same to a *bona fide* holder, he cannot, on discovering the forgery, recover the sum paid. He must pay the bill twice. See *Hortsmann v. Henshaw*, *ante*, p. 57, and note.

The rule in the principal case as to the time of payment, relates of course to negotiable paper. In the case of unnegotiable bills or notes, payment may be made before maturity; for here there can be no party not affected with notice as in the case of an innocent indorsee of negotiable paper. The assignee of unnegotiable paper stands only on the rights of the assignor and payee; and as the defence of payment can always be raised between the original parties, so it can be raised against the assignee in this case. Story, *Bills of Exchange*, §§ 60, 199, 201, and cases cited. See *Whistler v. Forster*, 11 Com. B. (N. S.) 246. See following cases.

SWOPE *et al.* v. ROSS *et al.*

(40 Pennsylvania State, 186. Supreme Court, 1861.)

Paper not accepted discounted by drawee before maturity.—The drawee of a bill not accepted by him may discount the same before maturity and thus become holder of the paper. Such proceeding is not a payment, and the drawee can recover against the drawer at the maturity of the paper, upon taking the usual proceedings to charge him.

ASSUMPSIT between George Ross & Co., plaintiffs, and Swope and Karns, in which the following case was stated for the opinion of the Court in the nature of a special verdict.

Ross Forward gave to Swope and Karns the following instrument of writing :—

“SOMERSET, PA., August 18, 1859.

“George Ross & Co., bankers, pay to Swope and Karns, or order, ninety days from date, six hundred and sixteen dollars.

“ROSS FORWARD.”

On or about the first of September thereafter, Swope, one of the firm of Swope and Karns, delivered this paper, (indorsed Swope and Karns) to the plaintiffs' bank, had the same discounted, and received the money thereon, less the discount, \$16.40.

At the time this check was given, and when it was discounted at the bank, Ross Forward was one of the firm of George Ross & Co., but went out on the nineteenth of September, 1859.

When the day of payment named in the check came round, Forward had no funds in the bank, and the paper was regularly protested for non-payment on the nineteenth of November, 1859.

If the Court be of the opinion that on the above state of facts, the plaintiffs are entitled to recover, the judgment to be entered in favor of plaintiffs for \$616, with interest from November 19, 1859; otherwise judgment for defendant with costs. Notice of dishonor of the bill was admitted in the argument. The Court below entered judgment for plaintiffs for \$616, with interest from November 19, 1859.

The defendants thereupon sued out this writ, and assigned the entry of judgment for plaintiffs for error.

STRONG, J. The question presented by the case stated is quite novel, and we have not been able to find that it has been adjudicated. Undoubtedly the acceptor of a bill of exchange is the principal debtor, and the drawer and indorsers are but sureties. Of course the acceptor, even after payment, cannot sue either the drawer or indorser of the bill unless his acceptance was *supra protest*. His payment of the bill extinguishes it, but the case stated finds that the plaintiffs discounted the bill for the payees before it became payable, not that they accepted it or paid it. Discounting a bill, though it be done by the drawee, is neither acceptance nor payment: Acceptance is an engagement to pay the bill according to its tenor and effect when it becomes due, not before. A bill is paid only when there is an intention to discharge and satisfy it. In *Burbridge v. Manners*, 3 Camp. 194, Lord *Ellenborough* said "that even payment of a bill before it became due, does not extinguish it any more than if it were merely discounted," and added that "payment means payment in due course and not by anticipation." His lordship evidently thought that discounting a bill by a drawee is neither payment nor extinguishment. In *Attenborough v. McKenzie*, in the English Court of Exchequer, 36 Eng. L. & Eq. 562, it was held that if the acceptor of a bill discounts it, he may reissue it so as to charge the drawer; that nothing will discharge the drawer but payment; *i. e.*, payment when due, or payment for the purpose of discharging and satisfying the bill. Therefore, if the acceptor discounts the bill for the drawer and then indorses it away, the drawer will be liable upon it to the holder, and the transfer by the drawer to the acceptor will operate as an indorsement, although, at the time, the drawer does not intend to transfer by way of indorsement, being under the impression that the bill is discharged by coming into the hands of the acceptor. Nor will the payment of the amount less the discount, be deemed a payment of the bill by the acceptor. In that case the holder of the bill took it by indorsement after it was due, from the transferee of the acceptor. The ruling goes to the length that even the accepting drawee of a bill may take it as an indorsee, and as such may issue it. It also decides that he does take it as an indorsee when he discounts it. Can then the drawee

of a bill, payable on time, who has discounted it, maintain an action on it against the drawer or indorser if it be protested for non-payment and notice be given? He is not a party to the bill until he has accepted it. Until then, he has not assumed the position of principal debtor, nor undertaken any obligation in regard to it. His discounting has neither paid nor extinguished it, and it is not a promise to pay according to its tenor and effect. Is he precluded from becoming an indorser by the fact that the bill was directed to him? It seems well settled that the drawee of a bill may accept or pay it, *supra protest*, for honor of the drawer or indorser, and if he takes it up he stands in the position of an indorsee paying full value for it, has the same remedies to which an indorsee would be entitled against all prior parties, and can of course sue the drawer or indorser. Chitty, Bills, 375. In such cases the fact that the bill was drawn upon him does not incapacitate him from acquiring the rights of an indorsee. No reason is apparent for a different rule where the drawee becomes the holder by discounting the bill before its dishonor. Uncertain whether the drawer will put funds into his hands to meet the bill at maturity, he may well refuse to accept, and yet may discount it on the credit of both the drawer and indorser. If he does not accept he is as much a stranger to it as any other person discounting it for the drawer or indorser; is but purchasing the contract, and the contract thus purchased is that the drawee will pay the bill on presentment, when it shall fall due, or in case of his failing to do so, that the parties whose names are already upon it will pay, if due notice of its dishonor be given to them. The promise is made by the parties to the bill. The purchaser enters into no engagement.

These views accord with the doctrine laid down in *Desha Sheppard & Co. v. Stewart*, 6 Ala. 852, a case which more closely resembles the present than any we have been able to find. In it the Supreme Court of that State ruled that the drawees of a bill may sue the drawer or indorsers after it has been dishonored, even though they obtained the bill before its dishonor: and that until acceptance they are strangers to the bill, and may acquire rights to it, and stand in the same condition as any other holder. It was said that there is no legal presumption if the drawee comes into possession of the bill previous to its dishonor, that he takes it with the obligation to accept.

Such being in our opinion the law, it was not error that the Court of Common Pleas gave judgment for the plaintiff upon the case stated. The fact is not distinctly found that notice of dishonor of the bill was duly given to the defendants, but it was conceded on the argument that such was the fact, and that such is the meaning of the case stated.

The judgment is affirmed.

So where the maker of an indorsed note offers it for discount before maturity, this is not notice to the purchaser of payment. *Eckert v. Cameron*, 43 Penn. State, 120, citing the same authorities as those referred to in the principal case. But if the paper comes into the possession of one of the parties liable to pay it, after it has been negotiated, such possession is *prima facie* evidence of payment. *McGee v. Pronty*, 9 Met. 547; *Dugan v. United States*, 3 Wheat. 172. See also *Fisher v. Marvin*, 47 Barb. 159. See also upon the subjects discussed in the principal case, 2 Parsons, Notes and Bills, 455, 456, and cases cited.

EASTMAN v. PLUMER.

(32 New Hampshire, 238. Supreme Court, December, 1855.)

Wrongful payment by principal debtor. Effect as to surety. — The defendant signed a negotiable note as surety for the principal maker. The note was indorsed in blank, and the indorsee called upon the principal debtor for payment. The latter brought the money, paid the amount, and received the note. In point of fact this money paid by the principal had been furnished by a third person, who sent it to purchase the paper through the principal as his agent, though this fact was unknown to the holder. This third person, the owner of the money, brought an action on the note against the defendant, the surety. *Held*, that the payment by the principal discharged the paper as to the surety, and that the action could not be maintained.

ASSUMPSIT upon a promissory note, payable to order, and indorsed in blank.

Defence, payment. The defendant, a surety, proved that the note had been paid to the indorsee of the payee by the principal maker, and the note delivered to him. The plaintiff then proved that the principal debtor had received the money from himself, under an arrangement not communicated to the holder, by which the plaintiff was to become purchaser of the note; that, on payment of the money to the holder, the principal received the paper

and delivered it to the plaintiff; and that he had acted in the matter as the plaintiff's agent.

PERLEY, C. J. The defendant signed the note in question as surety for Young, the other maker; the note was indorsed in blank by Roby, the payee, and the indorsee and holder called on Young, the principal, for payment. Young came with the money, paid it over to the holder, and took the note. The holder called for payment of the party primarily bound to pay, and received of him the amount of the note, as and for payment, without notice of any interest that a third person had in the money paid. The holder therefore made no contract to transfer the note.

The contract of the defendant was to pay the note to Roby, the payee, or his order. By his indorsement in blank, Roby ordered the note to be paid to the indorsee, or to such other person as should become the holder of the note by transfer of the note from Roby. But the holder under Roby's indorsement has made no transfer of the note as an existing security. He has received the amount due on the note from the principal debtor, and given up the note to him, as paid and discharged. Looking at the case, then, as a mere matter of contract, according to his original undertaking on the note, the defendant has not bound himself to pay it to this plaintiff, because Roby, the payee, has never ordered the contents to be paid to him.

The holder of the note was not bound to assign it. He might insist that the note should be paid and discharged before he delivered it out of his hand. If he transferred the note by delivery merely, though he would not be liable as indorser, his assignment would still be a contract involving certain liabilities on his part. He would, for instance, be held to warrant that the note was genuine. Story, Bills, 118.

In this case there was no assignment of the note, in any proper sense of those terms, by the holder to this plaintiff, and the defendant made no contract to pay, except to the payee, or an assignee under him.

This has little resemblance to the case where the surety pays a debt and the law subrogates him to the securities which the creditor holds from the principal debtor; or to the case of one interested in a mortgage, who discharges an incumbrance to protect his own interest, and holds a security on the mortgaged property for

the money he has advanced. In such cases, though the form of the transaction is payment, and though it operates as payment, so far as to discharge the original debtor from any action on his contract to recover the money, the law keeps the security on foot to protect the equitable interests of the party who has paid his money under such circumstances.

This defendant was surety, and was interested that the note should be paid by the principal. The holder called on the principal to pay, and he came with the money, paid it over, and the note was given up to him by the holder, with the understanding on his part that it was paid and discharged. So far as the holder of the note and the surety had any information, the note was paid, and the surety was discharged, and had a right to rely on the transaction as a payment. But if the plaintiff can maintain this action, the surety might be called on to pay the debt at any time within six years after it fell due, in virtue of a secret arrangement between the plaintiff and the principal debtor, by which the principal would be enabled to deceive his surety with every appearance of having paid the debt, and so relieved the surety from his liability.

The manifest object of the arrangement with the plaintiff, as stated by the principal debtor, was to gain time, and defer payment longer than the holder of the note would allow, by getting the plaintiff to advance the money and wait for repayment. If the plaintiff intended to resort to the surety for payment, the arrangement was unfair towards him; and if the bargain had been positive to wait on the principal for a definite time, it would have discharged the surety, without regard to any other defence.

On this case we think there was no such transfer of the note to the plaintiff as would give him a right of action on it against this defendant, and that as to him it must be regarded as paid and discharged.

According to the agreement of the parties, the verdict must be set aside, and judgment entered for the defendant.

With respect to the kindred subject of payment by the drawer or indorser, there seems to be some confusion among the cases; but it is believed that the confusion has arisen from not carefully distinguishing between ordinary and accommodation paper. It is plain that in the case of accommodation paper, the party accommodated is the real and ultimate debtor; and in sound reason payment by him should discharge the paper. See *Lazarus v. Cowie*, 3 Q. B. 459. But in the case of ordinary commercial paper, the maker or acceptor is the real

debtor, and he alone as it should seem can give a valid discharge. *Mechanics' Bank v. Hazard*, 13 Johns. 353.

Cresswell, J., in *Jones v. Broadhurst*, 9 Com. B. 173, discusses this subject in an able manner, both on principle and authority. In delivering the opinion of the Court he said:—

“The declaration in this case charges the defendant as the acceptor of a bill of exchange for £19, drawn by W. & C. Cook, payable to their order at three months after date, and indorsed by the drawers to the plaintiffs; and, among other pleas not material to be noticed on the present occasion, the defendant by his fourth plea alleged that, after the indorsement of the bill of exchange to the plaintiffs, and before the commencement of the action, the drawers of the bill had delivered to the plaintiffs, and the plaintiffs had accepted, divers goods of the value of £50 in full satisfaction and discharge of the said bill of exchange, and all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the said bill of exchange to the time of the pleading of the plea, had always held the same against the will and consent of the said drawers, and so still held the same; and that the plaintiffs commenced this action, and still prosecuted the same, against and in opposition to the will and consent of the said drawers.

To this plea the plaintiffs replied *de injuria*; and a verdict was found for the defendant upon the trial of the issue joined on that plea.

A rule has since been obtained by the plaintiffs, calling upon the defendant to show cause why judgment should not be entered for them *non obstante veredicto*, in respect of the insufficiency of that plea.

Upon this record the bill of exchange must be taken to have been accepted upon a good consideration. The interest of the acceptor, therefore, is not liable to be affected by the state of accounts or equities between any other parties connected with the bill; and the only question in which he has any interest is, whether the party seeking to enforce payment by him is the legal owner of the bill, and whether recovery by and payment to such party will enure as a satisfaction and absolute discharge of his liability upon the bill. By the indorsement averred in this declaration, and not traversed, the plaintiffs became the legal owners of the bill; and the recovery of the amount thereof will have the effect of discharging the defendant from all future liability. The plea does not allege whether such satisfaction was given and accepted before or after the bill became due; nor is it averred to have been at the request, or for, or on behalf of the defendant, or in satisfaction of his liability upon the bill, or of the cause of action of the plaintiffs against him; nor does it in any way connect the defendant with the transaction, or show any privity between him and the parties to the satisfaction given, except so far as such parties were the drawers of the bill, and the defendant was the acceptor.

As the plea did not allege that the satisfaction was made at the request, or for or on behalf of the defendant, or in respect of the cause of action stated in the declaration, the defendant was not required to give any evidence to such effect, to entitle him to the verdict he obtained; and therefore the verdict will not warrant an intentment of any such facts, or of any other fact tending to extend the import of the plea as stated upon the record; and the question raised by the plea according to its terms is, whether satisfaction of a bill as between a drawer

or indorser and an indorsee, made before or after the bill becomes due, enures as a satisfaction on behalf of the acceptor, and operates to discharge *him* from liability to the indorsee.

In support of the rule it was contended that the plea did not show sufficient matter to bar the plaintiffs from judgment, because the satisfaction therein set forth was not, as before stated, averred to have been made at the request, or for or on behalf of the defendant, or for or in respect of the cause of action declared upon; and that no legal privity was shown between the parties who made satisfaction, and the defendant, and therefore the satisfaction made did not enure as a discharge of the defendant; and that the satisfaction was made by parties who were under a personal liability upon the bill declared on, either absolute or contingent; and that the plea imports that the satisfaction made by them referred and was limited to their own personal liability, and was not shown to have extended beyond; and that the satisfaction to the indorsee of a bill made by the drawer or indorser did not, as a legal consequence, enure as a satisfaction of the bill *quoad* the acceptor or any other person other than those who, if called upon by the indorsee to pay the bill, would have a remedy over against the party who made the satisfaction, and thereby subjecting such party to a liability to make double satisfaction.

It was also insisted that the plea did not show any legal privity between the drawers who made the satisfaction and the defendant; and that the plea, therefore, at most amounted to a plea of satisfaction made by a stranger, and, as such, could not be pleaded in bar against the plaintiffs.

On the part of the defendant, it was contended, upon showing cause, that, upon principal and authority, satisfaction made by the drawer of a bill to an indorsee, enured by law as a satisfaction by or on behalf of the acceptor, and might therefore be pleaded in bar to any action afterwards brought by the indorsee against the acceptor; and that the drawer and acceptor's being parties to the same bill was a sufficient legal privity to make satisfaction by the drawer enure as a discharge of the acceptor, as against the indorsee who received the satisfaction; and further, it was contended that it was competent to any one to plead in bar satisfaction, even by a stranger, for the cause of action sued upon, which had been accepted by the plaintiffs.

The case was very elaborately argued, and many authorities were referred to on both sides. The Court has examined all the authorities referred to, and considered the case, and in the result is of opinion that the plea, as proved and sustained by the verdict, does not show sufficient matter to bar the plaintiffs, and that the rule to enter judgment for the plaintiffs *non obstante veredicto*, must be made absolute.

In considering the case upon principle, it will be proper to advert to the legal relation in which the respective parties stand towards each other, upon the effect of whose acts and rights the determination of the rule must depend. It is to be observed that the drawers and acceptor are parties to the same instrument as contractors with each other, and not as joint contractors with a third person; and that, by the indorsement of the bill, independent and different contracts arise on the respective parts of the drawers and the acceptor, with the indorsees. The acceptor is primarily and absolutely liable to pay the bill, according to its tenor. The drawers are liable only upon the contingencies of

the acceptor's or drawee's making default, and of the holder's performing certain conditions precedent, such as presenting the bill according to its tenor, and giving due notice of the failure of the acceptor or drawee to pay upon a proper presentment.

The contracts created by the bill, as regards the drawers and the acceptor, are therefore essentially distinct; and there seems to be no legal ground why the indorsee of a bill may not accept satisfaction of the contingent or absolute liability of the drawer, without, by so doing, discharging the acceptor.

The competency of an acceptor to pay may be doubtful; and no valid reason is apparent why the indorsee may not release and discharge the drawer or an indorser by competent legal means, either upon consideration more or less valuable, or without, and retain his remedies against the acceptor; unless in the case of an accommodation bill, in which case the acceptor is a mere surety as between him and the drawer, and entitled to recover against the drawer whatever he may be compelled to pay in discharge of his suretyship. In such a case, where an indorsee who has received satisfaction from the drawer with notice sues the acceptor, a different question may arise; but upon the record in this case the bill must be taken to have been a bill accepted for value, and which the acceptor therefore ought, in all events, to pay; and, having received value, it is difficult to discover any valid reason why he should be discharged from his liability to make the payment, which for value he has contracted to make, by reason of any arrangements between others to which he is no party, in which he is not shown to have interfered, or his rights and liabilities are not shown to have been in the contemplation of the parties to any such arrangements, and by which his interests are not in any respect compromised or affected.

By the indorsement of a bill, the indorsee becomes the legal owner of it; and satisfaction of the contingent or absolute liability of the drawer, or of an indorser, does not necessarily vacate or avoid the effect of the indorsement, or destroy the title of the indorsee to the ownership of the bill. Payment of the bill by a drawer or an indorser may or may not, according to circumstances, entitle the party paying to the possession of the bill; there may be a satisfaction of the bill between such parties, which may not entitle them to the possession of the bill. The plea in question has no statement to the effect that the drawers, by reason of the satisfaction made, were entitled to have the bill delivered up; it only states that the plaintiffs hold the bill against the will and consent of the drawers, which is by no means equivalent to a statement that they were entitled to have the bill delivered to them. The plea does not aver that the value of the goods delivered in satisfaction was equal to the amount of the bill; and it is consistent with the language of the plea that the drawers may have made satisfaction of the bill, so far as regarded their liability, by any small composition, leaving the plaintiffs with all their remedies in point of law against the acceptor and other parties to the bill; and yet the drawers may afterwards have dissented from the plaintiffs' retaining the bill, or suing the acceptor upon it.

The terms of the plea do not import that the satisfaction was made upon any contract or condition, either that the bill should be delivered up, or be deemed to be satisfied as between the plaintiffs and the acceptor; and, when the nature of the relation in which the respective parties stand towards each other is considered, no principle is apparent upon which, as a consequence in law, the satisfac-

faction of a bill as between the indorsee and the drawer, should operate as a satisfaction and discharge in favor of the acceptor.

Supposing the effect of the plea to be that the plaintiffs are suing as trustees for the drawers, but against their consent, such matters would furnish no legal bar to the plaintiffs, as the law can take no notice of the trust, nor, consequently, whether the trustee is enforcing his legal rights against a third person with or against the consent of his *cestui que trust*. And we are of opinion that the defendant has not established any legal principle which will entitle him to judgment upon this plea.

But it has on his behalf been contended, that the plea ought to be supported, and judgment given for the defendant upon authority.

We have reviewed the authorities relied upon, and they do not appear to us to entitle the defendant to judgment.

The case of *Bacon v. Searles*, 1 H. Bl. 88, was cited; and it must be admitted that in that case, according to the report, it was held that the indorsee of a bill who had received from the drawer a part of the amount of the bill, was entitled to recover from the acceptor only the balance; and Lord *Loughborough* then Chief Justice, is reported to have said that, "if the drawer of a bill anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking;" and he adds: "so that, if the acceptor were to pay the bill after notice given to him that the drawer had already paid it, an action would lie for the drawer against the acceptor to recover back the money so paid." Lord *Loughborough* concludes his judgment by saying: "Another reason which weighs much with me is, the great mischief which would ensue to merchants, among whom accommodation bills are circulated to a vast extent, if, after a bill had been taken up by the drawer, the acceptor should be called upon for payment." The report of this case is not satisfactory. Lord *Loughborough* is made to say that, if the drawer anticipates the acceptor and pays the money himself, he thereby releases the acceptor from his undertaking; and yet he is said to have added, "that if the acceptor were to pay the bill, after notice given to him that the drawer had already paid it, an action would lie for the drawer to recover it back again;" which, as applied to the facts of the case, is not very intelligible. If it was meant that, supposing the drawer should sue the acceptor upon the bill the acceptor could not plead in bar the payment to an indorsee, after notice that the drawer had paid it, it is intelligible, but not, upon the facts stated, very satisfactory. The point in judgment was, whether an indorsee, after having received payment of part of the bill from the drawer, was entitled, in an action against the acceptor, to recover the whole amount of the bill, or only the balance of the bill remaining unpaid; and it was held that the balance only was recoverable. As a decision upon that point it has been overruled. The observations made by the judges render it uncertain whether it was the case of a bill for value, or an accommodation bill; but those observations are of doubtful accuracy in either view of the case. If it was a bill for value, the remark is not correct that payment by the drawer discharged the acceptor from his promise; because the acceptor in such a case would be clearly liable to the drawer, who, by his payment to the indorsee, would become entitled to sue the acceptor upon the bill; and if it was the case of an accommodation bill, the remark is unintelligible that, if the acceptor, who would be surety only for the drawer, was to pay the bill

after notice, the drawer, who was the principal debtor, might recover the money back again from the acceptor, his surety.

It may be that what was intended to be said was that such a payment by the acceptor would make the indorsee a trustee for the drawer, and liable to refund to him what should be paid by the acceptor; but it is by no means clear that this was intended to be said, because the remarks refer to the acceptor's liability to refund, in terms, and speak of a payment by the acceptor after notice of payment by the drawer, — which would be quite immaterial upon the question whether the indorsee would become a trustee for the drawer, in regard to the sum received from the acceptor. The doubt whether it was the case of a bill for value or an accommodation bill, is increased by the observations of Mr. Justice *Wilson*, who referred to a case of *Beck v. Robley*.

Considering this case of *Bacon v. Searles* with reference to the point decided, — that part of a bill (accepted for value) being paid by a drawer or indorser, disentitles the indorsee to recover from the acceptor more than the balance remaining unpaid, — it has been overruled by modern decisions, and is not now to be deemed to be law; and, if it is to be considered as the case of an accommodation bill, it is inapplicable to the questions which arise upon this plea.

Mr. Justice *Wilson* referred to the case of *Beck v. Robley*, reported in a note to *Bacon v. Searles*, and which, it would seem from the statements in the report, was the case of an accommodation bill. The facts were these: Brown drew the bill upon Robley, payable to Hodson, and gave the bill to Hodson as security for an advance made to him by Hodson. Robley accepted the bill, and Brown, the drawer, took it up when due, in Hodson's hands, and received back the bill with Hodson's indorsement upon it. Brown, *after the bill had become due*, paid it to Beck, who brought the action against Robley. The action was held not to be maintainable; and correctly so, as, after the bill had become due, the drawer could only negotiate it subject to such equities as existed against him; and, it being an accommodation bill, Brown, the drawer, could not have sued the acceptor, and so neither could a subsequent holder claiming under him after the bill had become due. The decision against the plaintiff, therefore, would have been correct, irrespectively of another fact relied upon in that case, viz., that Beck, the plaintiff, was compelled to claim through the indorsement of Hodson, the payee; and the Court was confirmed in its decision against the plaintiff, upon the ground, that, if effect were given to Hodson's indorsement under the circumstances, Hodson himself might be rendered liable, — a result which ought not to occur. It is unnecessary to consider the correctness of that opinion; but both the cases of *Bacon v. Searles* and *Beck v. Robley* would be well decided, if the bills upon which those actions were brought were accommodation bills; and *Beck v. Robley*, in that event, might be considered as an authority for the determination of *Bacon v. Searles*.

Upon *Bacon v. Searles* being cited as an authority, in *Purssord v. Peck*, 9 Mees. & W. 196, as deciding that a payment by the drawer of a bill discharged the acceptor *pro tanto*, Lord *Abinger*, C. B., said, that, "if that were the principle of that case, it might be a question whether, if it were now considered, it would not be overruled."

The case of *Johnson v. Kennion*, 2 Wils. 262, was cited as an authority, on

the part of the plaintiffs, that the contract created by the bill, could not be severed and made the ground of two actions, and that the holder must bring an action for the whole, and be considered trustee for the drawer, for so much as he had paid. Mr. Justice *Wilson* is said to have referred to the case of *Beck v. Robley*, as contrary to that position; but it is not obvious that such is the effect of *Beck v. Robley*. *Johnson v. Kennion*, however, distinctly decided that the indorsee was entitled to recover the whole amount of the bill, although he had received a part from the drawer: and, unless *Bacon v. Searles* and *Beck v. Robley* were distinguishable, upon the ground of the actions being upon accommodation bills, it does not appear how the authority of *Johnson v. Kennion* was avoided.

Assuming, however, *Bacon v. Searles* and *Beck v. Robley* to be authorities that the acceptor of a bill for value is discharged altogether, or *pro tanto*, by payments made by a drawer or indorser to an indorsee, who afterwards sues the acceptor, they cannot be considered as binding authorities; and they are inconsistent with *Callow v. Lawrence*, 3 M. & S. 95, where the continued liability of the acceptor is distinctly determined; and *Hubbard v. Jackson*, 1 M. & P. 11 [E. C. L. R. vol. 17]; s. c. 4 Bing. 390 [E. C. L. R. vol. 13, 15]; 3 Car. & P. 134 [E. C. L. R. vol. 14] is a decision to the same effect, following the authority of *Callow v. Lawrence*; and, in both cases, *Beck v. Robley* was treated as a decision upon the ground that the plaintiff could not claim through Hodson's indorsement.

Pierson v. Dunlop, 2 Cowp. 571, was an action against the acceptor of a bill for £300. The drawer having paid £180, the plaintiffs took a verdict for the whole amount, which the Court compelled them to reduce, at their own cost. There can be little doubt that this also was the case of an accommodation bill; as it appears, that, after the verdict, a bill in equity was filed to obtain a discovery of the payment, and reduction of the verdict; and, if the *cestui que trust* of the plaintiffs was not entitled to receive the £180, the Court, in its equitable jurisdiction, could not have permitted their trustee to recover it. The case would resolve itself into that of a payment by the principal debtor, in case of the surety.

In the case of *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652, the plaintiffs were required to give the acceptor credit for the amount of the payment made by the drawer, the Court holding the bill to be an accommodation bill.

The several other cases which were cited on the part of the defendant, are no authorities for the purpose for which they were cited: indeed, they are rather against him.

In *Purssord v. Peek*, 9 Mees. & W. 196, the Court held that the plea was bad for duplicity: it alleged that the defendant, the acceptor of a bill of exchange, had accepted it for the accommodation of the drawer, and that the drawer had satisfied the bill; and it further stated, that, at the time of the action, the plaintiff was a holder of the bill without consideration or value.

Reynolds v. Blackburn, 7 Adol. & Ellis, 161 [E. C. L. R. vol. 34]; 2 N. & P. 137, was an action by indorsee against the acceptor of an accommodation bill; and the plea alleged, by way of discharge, notice to the plaintiff, and that, after such notice, he received other bills from the drawer, and agreed to give time upon the bill sued upon, until such other bills should become due, and be

dishonored; the plea proceeded to state that the bills were so delivered and accepted in payment of the bills in the declaration, and that the agreement was made without the defendant's knowledge, privity, or assent. The plaintiff replied *de injuria*; to which the defendant demurred, for duplicity. The Court said the replication was as good as the plea, which had set up two defences, and gave judgment for the plaintiff.

Sard v. Rhodes, 1 Mees. & W. 153; Tyr. & G. 298; 4 Dowl. P. C. 743; 1 Gale, 376, was also an action against the acceptor of an accommodation bill, in which the defendant pleaded, that the bill was an accommodation bill, and that the drawer had given another note, for a larger sum, in payment and satisfaction, which the plaintiff had accepted. The plaintiff replied that the note so given was dishonored. The defendant demurred, and the replication was held ill, and the plea good.

In each of the three last-mentioned cases, the pleas alleged the bills to be accommodation bills, — showing what is now understood to be the law in regard to payments or arrangements between subsequent parties to the bill, which can have little application to the present case, which is that of a bill accepted for value.

Field v. Carr, 5 Bing. 13 [E. C. L. R. vol. 15]; 2 M. & P. 46 [E. C. L. R. vol. 17] is also inapplicable: it was an action by bankers, as indorsees, against the acceptor: the drawer having delivered the bills to the plaintiffs, his bankers, as security, and the acceptor having paid the amount of the bills to the drawer without obtaining the bills, which remained in the hands of the bankers: and the point really in contest was, whether, upon the application of the rule in *Clayton's Case*, 1 Meriv. 572, 604, the bills, as against the bankers, the plaintiffs, were to be considered as satisfied; the Court held that they ought to be so considered.

The case of *Thomas v. Fenton*, 5 Dowl. & L. 28, was argued before Mr. Justice *Coleridge*. It was an action against the drawer of an accommodation bill; and it appeared that, the bill being dishonored, an action had been brought by one Clark against the acceptor, and that the plaintiff, as a volunteer, — being the son-in-law of the acceptor, — had paid the debt and costs, and obtained the bill from the then plaintiff, with the defendant's indorsement upon it, and brought the present action upon the bill. One question was, whether the bill ought to be deemed an accommodation bill. A further question was, whether there was a sufficient dispensation of giving notice of the dishonor; also, whether the payment which had been made supported the plea of payment by the acceptor. An objection was also made that the bill required a new stamp. Mr. Justice *Coleridge* held that the bill did not require a new stamp, inasmuch as it had never been paid, payment meaning payment by the party ultimately liable, and the payment in question not being such a payment. He also held, that sufficient excuse was alleged for not giving notice, the bill being an accommodation bill. And the learned judge distinctly intimates that payment by an intermediate party is no discharge to the acceptor.

Hemming v. Brook, Car. & M. 57 [E. C. L. R. vol. 41], was an action against the acceptor, where the drawer had paid part of the bill. The cause was undefended; the counsel for the plaintiff was instructed as to the payment, but altogether uninformed whether the bill was an accommodation bill, and of

every other circumstance respecting it. The judge, therefore, recommended that a verdict should be taken, giving credit for the payment.

Pownal v. Ferrand, 6 Barn. & C. 439 [E. C. L. R. vol. 13], 9 Dowl. & Ry. 603 [E. C. L. R. vol. 22], determined that the indorser of a bill, paying a part of the bill to the holder, might recover from the acceptor the amount so paid, as money paid to his use. It is to be observed, that the plaintiff in that case had paid £40 on account of a bill indorsed by him, and which had been accepted by the defendant, for £350. After the payment of £40 by the plaintiff, the holder of the bill brought an action upon the bill against the defendant, the acceptor, and recovered a verdict for the whole amount of the bill, £350, but afterwards levied the balance only due to him, giving credit for the £40 which the plaintiff had paid; and, in consequence of the defendant's having thus derived the benefit of the plaintiff's payment, the action was brought by the plaintiff, to recover the amount as money paid to the defendant's use, when it was contended that the plaintiff could only sue upon the bill; but the Court held, that there might be a difficulty in suing upon the bill, by reason of a judgment having been recovered against him for the whole amount of the bill, by a former holder; and that the defendant having had the benefit of the payment, an action for money paid might be maintained.

Lane v. Ridley, 10 Q. B. 479 [E. C. L. R. vol. 59], was to the same effect as *Reynold v. Blackburn*, *Purssord v. Peek*, and *Pascoc v. Vyvyan*, 1 Dowl. N. S. 939; viz., that where the plea is double, it is no objection that the replication is also double.

Reference has thus been made to the several cases which were cited, with some regret, as the only result is to show that they are inapplicable to this case, and afford no assistance to the Court in determining the question raised upon the record; and in fact no determination has been brought to the notice of the Court showing this plea to be good, although there are some expressions in some of the older cases which have that aspect, but which *dicta* were not necessary to the decision of the cases in which they are to be found; and such *dicta* are not consistent with subsequent determinations. It certainly has been no rare practice for indorsees of bills of exchange and promissory notes, to take verdicts for the full amount of the instruments, after having received partial payments from other parties to such instruments; and there are reported authorities in distinct affirmation of the right so exercised by the plaintiffs. *Callow v. Lawrence*, before mentioned, *Reid v. Furnival*, 1 Crompt. & M. 538, and numerous cases in bankruptcy, where proof is admitted against the acceptors of bills and makers of notes for the full amount, notwithstanding partial payments made by other parties. In *Ex parte De Tastet*, *In re Corson*, 1 Rose, 10, Warren and Bruce were held entitled to prove against the estate of the bankrupts, who were the acceptors for £1364, and take dividends for that amount, notwithstanding they had received payments from other parties, reducing their demand to £120.

We think, therefore, that this plea is contrary to principle, and that it has no authority to support it.

The plaintiffs stand upon the record the legal owners of the bill, and the defendant as having failed to perform his contract, without any legal excuse for the breach. The defendant was the party primarily liable, and by his plea he sets up, by way of discharge, satisfaction by one not in privity with him in relation to

such satisfaction, and which we think did not enure to his discharge; and we think the plea, therefore, bad, and the plaintiffs entitled to judgment as prayed."

An indorsee for value of a bill of exchange, who became such before its maturity, and in ignorance that it was given for accommodation, has a right to treat all parties thereon as liable to him according to their relative positions on the bill, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and this right is unaffected by any subsequently acquired knowledge that the bill was given for accommodation. In such case a release of the drawer by the holder has no effect upon the ultimate liability of the acceptor. *Farmers and Mechanics' Bank v. Rathbone*, 26 Vt. 19, given in full as a leading case under DISCHARGING INDORSER OR DRAWER, *post*. See also *Carstairs v. Rolleston*, 5 Taunt. 551; s. c. 1 Marsh. 207.

Payment by a stranger of the amount of a bill of exchange to the bankers at whose house the bill is payable, under an arrangement with such bankers whereby the party paying obtains possession of the bill for a collateral purpose of his own, is not payment by the acceptor. *Deacon v. Stodhart*, 2 Man. & G. 317.

But if a stranger makes payment of a note overdue, and declines to have the same cancelled, but takes it away with him, this will be regarded as payment and satisfaction against a party who afterwards received the note from the stranger; the latter not being a *bona fide* holder. *Burr v. Smith*, 21 Barb. 262.

The fact that the holder of a bill, accepted for the drawer's accommodation, sends it to a bank for collection, and the bank passes the amount to the credit of the holder at the maturity of the paper, will not constitute such payment as to discharge the acceptor. *Pacific Bank v. Mitchell*, 9 Met. 297.

It is no discharge of a note given with security to a bank for the purpose of obtaining credit, which is given to the amount of the note, that the maker at one time had a balance in the bank exceeding the amount of the note. *Pease v. Hirst*, 10 Barn. & C. 122.

If the drawer retain the acceptor's funds in his hands, for the express purpose of meeting the bill, the holder's releasing the acceptor does not discharge the drawer. *Sargent v. Appleton*, 6 Mass. 85. Upon this subject, see DISCHARGING INDORSER OR DRAWER, *post*.

PROCEEDINGS ON NON-PAYMENT.

GLENDY BURKE v. ROBERT MCKAY.

(2 Howard, 66. Supreme Court of the United States, January, 1844.)

Protest of promissory note. — It is not necessary in Mississippi, or by the general law merchant, that a promissory note should be protested by a notary, or that he should give notice of dishonor.

THE case is stated in the opinion of the Court.

STORY, J. This is a writ of error to the Circuit Court of the District of Mississippi. The plaintiff in error brought an action of assumpsit in that Court, against the defendant in error, as indorsee upon a promissory note, dated at Clinton, Mississippi, January 20, 1837, whereby R. E. Stratton, Samuel W. Dickson, and B. Garland, or either of them, on the first day of January, 1840, promised to pay Robert Mathews, or order, \$2800, for value received. The note was indorsed by Mathews as follows: "I assign the within note to Robert McKay, and hold myself responsible for the same, waiving notice of demand and protest, if not paid at maturity." The note was afterward indorsed by McKay (the defendant), as it should seem, in blank, and the plaintiff in error, in his declaration, made title as immediate indorsee to McKay.

At the trial of the cause, upon the general issue, the plaintiff read the note and the indorsement, and also proved that, at the maturity of the note, due demand of payment was made of the makers by S. W. Humphreys, a justice of the peace of Hinds county, Mississippi, styling himself "acting notary public;" who, upon the non-payment, made due protest thereof (the protest being by consent admitted as evidence of the facts), and gave due notice thereof to the payee of the note and to all the indorsers. The

defendant (McKay) also admitted that, in a settlement with the makers of the note, in some other transactions, the present note was included, and the defendant released the makers from all liability thereon, but he denied that he had ever received of the makers full payment of the said note; and that, upon a compromise of all claims and controversies between them, he released the makers from all liability to the defendant; and he agreed that the same statement should be read and received at the trial of the case by the Court and the jury. The district judge (who alone sat in the cause) instructed the jury that, in order to charge the indorser of a promissory note, the plaintiff must prove that it was protested on the day of its maturity by a notary public, and demand made, and notice of non-payment given by him; that the statement of Humphreys admitted as evidence, not proving that fact, they must find for the defendant. Whereupon the jury returned a verdict for the defendant, and judgment passed accordingly. A bill of exceptions was taken by the plaintiff, to the instruction of the Court at the trial; and the cause now comes before us upon the writ of error to examine the correctness of that instruction.

And we are all of opinion that the instruction was incorrect, and not maintainable in point of law. In the first place, by the general law merchant, no protest is required to be made upon the dishonor of any promissory note, but it is exclusively confined to foreign bills of exchange. This is so well known that nothing more need be said upon the subject than to cite the case of *Young v. Bryan*, 6 Wheat. 146, where the very point was decided. It is true that it is a very common practice for a notary public to be employed to make demand of payment of promissory notes from the makers, and also to give notice of the dishonor to the indorsers thereon. But this is a mere matter of convenience and arrangement between the holder and the notary, and is by no means a requisite imposed or recognized by law as binding upon the holder. Unless, therefore, there be some statute in Mississippi requiring the intervention of a notary in such cases (as we understand there is not), or some general usage equally binding, it is clear that the instruction proceeded upon a mistaken ground. In the next place, it is no necessary part of the official duty of a notary (subject to the like exceptions) to give notice to the indorsers of the dishonor of a promissory note, although certainly it is a very convenient and useful course in the transactions of such affairs in commercial

cities. In the next place, if a protest were necessary, it is equally clear that it is not indispensable in all cases that the same should be actually made by a person who is in fact a notary. In many cases, even with regard to foreign bills of exchange, the protest may, in the absence of a notary, be made by other functionaries, and even by merchants. But where, as in Mississippi, a justice of the peace is authorized by positive law to perform the functions and duties of a notary, there is no ground to say that his act of protest is not equally valid with that of a notary. *Quoad hoc* he acts as a notary. See Howard and Hutchinson's Statutes of Mississippi, c. 37, § 24, p. 430.

In the next place, in the present case, under the circumstances, the indorser (McKay) was not entitled to any notice whatsoever of the dishonor. He had actually discharged the makers from all liability for the payment of the note by his release and settlement with them. Of course, the notice could be of no use or value to him: for he would in no event be entitled to any recourse over against them; and, therefore, no notice to him would have been necessary, although it fully appears that he had received due notice of the dishonor.

For these reasons, we are of opinion that the judgment ought to be reversed and *venire facias de novo* awarded.

Nor is a protest of inland bills necessary; and a protest either of a promissory note or inland bill of exchange is not evidence of the statements made in it. *Union Bank v. Hyde*, 6 Wheat. 572.

Fees for protesting promissory notes or inland bills cannot be recovered. *City Bank v. Cutter*, 3 Pick. 414.

MILLS, Plaintiff in Error, v. THE PRESIDENT, DIRECTORS,
&C., OF THE BANK OF THE UNITED STATES, Defendants in
Error.

(11 Wheaton, 431. Supreme Court of the United States, February, 1826.)

Form of notice.—Notice to an indorser is not defective by reason of not stating the name of the holder, or by reason of a misdescription of the date of the note in question, provided there was no other note payable at the same place and made and indorsed by the same parties. Nor is it fatal to the notice that it did not contain a formal allegation that payment was demanded at the bank when the note became due. It is sufficient that it states the fact of the non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made is matter of evidence to be established on the trial.

THE case is stated in the opinion of the Court.

STORY, J. This is a suit originally brought in the Circuit Court of Ohio, by the Bank of the United States, against A. G. Wood and George Ebert, doing business under the firm of Wood and Ebert, Alexander Adair, Horace Reed, and the plaintiff in error, Peter Mills. The declaration was for \$3600, money lent and advanced. During the pendency of the suit, Reed and Adair died. Mills filed a separate plea of non-assumpsit upon which issue was joined; and, upon the trial, the jury returned a verdict for the Bank of the United States, for \$4641, upon which judgment was rendered in their favor. At the trial, a bill of exceptions was taken by Mills, for the consideration of the matter of which the present writ of error has been brought to this Court.

By the bill of exceptions, it appears that the evidence offered by the plaintiffs in support of the action, "was, by consent of counsel, permitted to go to the jury, saving all exceptions to its competence and admissibility, which the counsel for the defendant reserved the right to insist in claiming the instructions of the Court to the jury on the whole case."

The plaintiffs offered in evidence a promissory note, signed Wood and Ebert, and purporting to be indorsed in blank by Peter Mills, Alexander Adair, and Horace Reed, as successive indorsers; which note, with the indorsements thereon, is as follows; to wit: "Chillicothe, 20th July, 1819. \$3600. Sixty days after date, I promise

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to pay to Peter Mills, or order, at the office of discount and deposit of the Bank of the United States, at Chillicothe, \$3600, for value received. Wood and Ebert." Indorsed, "Pay to A. Adair, or order, Peter Mills." "Pay to Horace Reed, or order, A. Adair." "Pay to the President, Directors, and Company of the Bank of the United States, or order, Horace Reed." On the upper right-hand corner of the note is also indorsed: "3185. Wood and Ebert, \$3600, Sept. 18-21." It was proven that this note had been sent to the office at Chillicothe, to renew a note which had been five or six times previously renewed by the same parties. It was proven, by the deposition of Levin Belt, Esq., Mayor of the town of Chillicothe, that, on the 22d September, 1819, immediately after the commencement of the hours of business, he duly presented the said note at the said office of discount and deposit, and there demanded payment of the said note, but there was no person there ready or willing to pay the same, and the said note was not paid, in consequence of which the said deponent immediately protested the said note for the non-payment and dishonor thereof, and immediately thereafter prepared a notice for each of the indorsers respectively, and immediately, on the same day, deposited one of said notices in the post-office, directed to Peter Mills, at Zanesville (his place of residence), of which notice the following is a copy: "Chillicothe, 22d of September, 1819. Sir, — You will hereby take notice that a note drawn by Wood and Ebert, dated 20th day of September, 1819, for \$3600, payable to you, or order, in sixty days, at the office of discount and deposit of the Bank of the United States at Chillicothe, and on which you are indorser, has been protested for non-payment, and the holders thereof look to you. Yours, respectfully, Levin Belt, Mayor of Chillicothe." (Peter Mills, Esq.) It was further proven by the plaintiffs, that it had been the custom of the banks in Chillicothe, for a long time previously to the establishment of a branch in that place, to make demand of promissory notes and bills of exchange on the day after the last day of grace (that is, on the sixty-fourth day), that the Branch Bank, on its establishment at Chillicothe, adopted that custom, and that such had been the uniform usage in the several banks in that place ever since. No evidence was given of the handwriting of either of the indorsers. The Court charged the jury: 1. That the notice, being sufficient to put the defendant upon inquiry, was good, in point of form, to charge him, although it did not name the

person who was holder of the said note, nor state that a demand had been made at the bank when the note was due; 2. That if the jury find that there was no other note payable in the office at Chillicothe, drawn by Wood and Ebert, and indorsed by defendant, except the note in controversy, the mistake in the date of the note, made by the notary in the notice given to that defendant, does not impair the liability of the said defendant, and the plaintiffs have a right to recover; 3. That, should the jury find that the usage of banks, and of the office of discount and deposit in Chillicothe, was to make demand of payment, and to protest and give notice on the sixty-fourth day, such demand and notice are sufficient.

The counsel on the part of the defendant prayed the Court to instruct the jury, "that before the common principles of the law relating to the demand and notice necessary to charge the indorser, can be varied by a usage and custom of the plaintiffs, the jury must be satisfied that the defendant had personal knowledge of the usage or custom at the time he indorsed the note; and also that before the plaintiffs can recover as the holder and indorser of a promissory note, they must prove their title to the proceeds by evidence of the indorsements on the note," which instructions were refused by the Court.

Upon this posture of the case no questions arise for determination here, except such as grow out of the charge of the Court, or the instructions refused on the prayer of the defendant's (Mills') counsel. Whether the evidence was, in other respects, sufficient to establish the joint promise stated in the declaration, or the joint consideration of money lent, are matters not submitted to us upon the record, and were proper for argument to the jury.

The first point is, whether the notice sent to the defendant at Chillicothe was sufficient to charge him as indorser. The Court was of opinion that it was sufficient, if there was no other note payable in the office at Chillicothe, drawn by Wood and Ebert, and indorsed by the defendant.

It is contended that this opinion is erroneous, because the notice was fatally defective, by reason of its not stating who was the holder; by reason of its misdescription of the date of the note; and by reason of its not stating that a demand had been made at the bank when the note was due. The first objection proceeds upon a doctrine which is not admitted to be correct; and no authority is produced to support it. No form of notice to an indorser has been

prescribed by law. The whole object of it is to inform the party to whom it is sent that payment has been refused by the maker ; that he is considered liable ; and that payment is expected of him. It is of no consequence to the indorser who is the holder, as he is equally bound by the notice, whomsoever he may be ; and it is time enough for him to ascertain the true title of the holder when he is called upon for payment.

The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In the present case the misdescription was merely in the date. The sum, the parties, the time and place of payment, and the indorsement, were truly and accurately described. The error, too, was apparent on the face of the notice. The party was informed that, on the 22d September, a note indorsed by him, payable in sixty days, was protested for non-payment ; and yet the note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances, the Court laid down a rule most favorable to the defendant. It directed the jury to find the notice good, if there was no other note payable in the office of Chillicothe, drawn by Wood and Ebert, and indorsed by the defendant. If there was no other note, how could the mistake of date possibly mislead the defendant ? If he had indorsed but one note for Wood and Ebert, how could the notice fail to be full and unexceptionable in fact ?

The last objection to the notice is, that it does not state that payment was demanded at the bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made, is matter of evidence to be established at the trial. If it be not legally made, no averment, however accurate, will help the case ; and a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser. In

point of fact, in commercial cities, the general if not universal practice is, not to state in the notice the mode or place of demand, but the mere naked non-payment.

Upon the point then, of notice, we think there is no error in the opinion of the Circuit Court.

As to the decision in this case respecting usage, see note to *Renner v. Bank of Columbia*, *ante*, 308.

The concluding portion of the opinion in the case of *Bank of Alexandria v. Swann*, 9 Peters, 33, *post*, 383, relates to this subject of the form of notice, and is given here in further illustration of the doctrine of the principal case.

Per *Thompson, J.*: "The next question is, whether, in the notice sent to the indorser, the dishonored note is described with sufficient certainty.

"The law has prescribed no particular form for such notice. The object of it is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment thereof.

"The misdescription complained of in this case, is in the amount of the note. The note is for \$1400, and the notice describes it as for the sum of \$1457. In all other respects the description is correct; and in the margin of the note is set down in figures 1457, and the special verdict finds that the note in question was discounted at the bank, as and for a note of \$1457; and the question is, whether this was such a variance or misdescription as might reasonably mislead the indorser as to the note, for payment of which he was held responsible. If the defendant had been an indorser of a number of notes for Humphrey Peake, there might be some plausible grounds for contending that this variance was calculated to mislead him. But the special verdict finds that from the fifth of February, 1828 (the date of a note for which the one now in question was a renewal), down to the day of the trial of this cause, there was no other note of the said Humphrey Peake, indorsed by the defendant, discounted by the bank, or placed in the bank for collection or otherwise. There was, therefore, no room for any mistake by the indorser as to the identity of the note. The case falls within the rule laid down by this Court in the case of *Mills v. The Bank of the United States*, 11 Wheat. 431 [the principal case], that every variance, however immaterial, is not fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In that case, as in the one now before the Court, it appeared that there was no other note in the bank indorsed by Mills; and this the Court considered a controlling fact to show that the indorser could not have been misled by the variance in the date of the note, which was the misdescription there complained of."

Mr. Justice *Story*, in his *Treatise on Promissory Notes*, § 348, after stating the general rule that no precise form of words is necessary to the notice, states that it should, however, either expressly, or by just and natural implication, contain in substance these matters:—

1. A true description of the paper, so as to ascertain its identity.
2. An assertion that it has been duly presented at maturity and dishonored.

3. That the holder, or other person giving the notice, looks to the person to whom the notice is given, for reimbursement and indemnity.

The first rule has been sufficiently considered in the principal case and note, *supra*. The following authorities, collected in Story, Promissory Notes, §§ 348, 349, are added as throwing additional light on the rule. *Hartley v. Case*, 4 Barn. & C. 339; *Beauchamp v. Cash*, Dowl. & R. C. N. P. 3; *Reedy v. Seixas*, 2 Johns. Cas. 337; *Bank of Rochester v. Gould*, 9 Wend. 279; *Smith v. Whiting*, 12 Mass. 6, 7; *Cook v. Litchfield*, 9 N. Y. (5 Seld.) 279; *Cayuga Bank v. Warden*, 1 Comst. 413; *Ransom v. Mack*, 2 Hill, 587-593; *Bradley v. Davis*, 13 Shepl. 45; *Clark v. Eldridge*, 13 Met. 96; *Wheaton v. Wilmarth*, 13 Met. 422; *Youngs v. Lee*, 18 Barb. 187. In the last case it was held sufficient that the notice gave the names of the maker and indorser, and the amount. See to the same effect, *Beals v. Peck*, 12 Barb. 245. See also *Bank of Cooperstown v. Woods*, 28 N. Y. 545; *Snow v. Perkins*, 2 Mich. 238, a misdescription in the amount, as in *Bank of Alexandria v. Swann*, *supra*, and held not fatal for the same reason, that the indorser could not have been misled. *Dennistoun v. Stewart*, 17 How. 606, a misdescription of the name of the acceptor held not fatal. But if the name were omitted, that would vitiate the notice. *Home Ins. Co. v. Green*, 19 N. Y. (5 Smith) 518. See also *Stockman v. Parr*, 11 Mees. & W. 809; s. c., 1 Car. & K. 41; *Rowan v. Odenheimer*, 5 Sm. & M. 44; *Routh v. Robertson*, 11 Sm. & M. 382.

The second rule is illustrated in the following case.

CALEB C. GILBERT v. LOUIS DENNIS.

(3 Metcalf, 495. Supreme Court of Massachusetts, March, 1842.)

Form of notice. — Mere notice of non-payment, which does not express or imply demand and dishonor, is not such notice as will render the indorser liable.

THE case is stated in the opinion of the Court.

After considering the subject of presentment, the Court say, —

SHAW, C. J. But the more formidable objection to the plaintiff's right of recovering is, that the notice, which is recited in the report, did not inform the defendant that demand had been made of the promisor, and payment refused, or in any other way, by express declaration or reasonable implication, inform the indorser that the note was in fact dishonored.

No particular form of notice is necessary. It may be either written or verbal. *Tindal v. Brown*, 1 T. R. 167. Nor will a mistake or misdescription of the note render the notice insufficient, if on the whole it cannot mislead the indorser, and if it so

designates and distinguishes the note, as to leave no reasonable doubt in the mind of the indorser, what note was intended, and that it was the same with the note in suit. *Smith v. Whiting*, 12 Mass. 6; *Bank of United States v. Carneal*, 2 Peters, 543.

But though no special form of notice is requisite, still in some form the fact to be notified is, that the note is dishonored by the default of the promisor; and this may be done verbally or in writing, in any language which communicates the information to the indorser, in terms, or by reasonable implication. Indeed the same formula, in terms, may communicate this information or not, according to circumstances. Suppose a note payable at a bank, in terms, or by the agreement of parties, or tacit agreement arising from usage or otherwise; it is the duty of the promisor to pay it at such bank on the last day of grace. The dishonor of such note by the promisor consists in the non-payment at the bank. If then, after the time of payment has elapsed, notice be given to the indorser that the note is unpaid, it is notice that it is dishonored; whereas, in case of a private holder, in regard to a note, which requires presentment and demand to fix the holder with a default, notice in the same words, that the note is unpaid, would not necessarily imply that it was dishonored, because that fact might be strictly true, though the note had never been presented, nor presentment waived or excused.

But whatever may be the form of the notice, whether written or verbal, we think the result of the decided cases is this: that the notice should be such that it will inform the indorser that the note has become due and been dishonored, and that the holder relies on the indorser for payment; that this information may be express, or may be inferred by necessary implication, or reasonable intendment, from the language; construing such language in reference to its accustomed meaning, when applied to similar subjects, and with reference to the terms of the note, the time and place at which the note is to be paid, as fixed by express or tacit agreement, or inferred from general or particular usages. It is not necessary to inform the indorser of the time, place, or mode of presentment and demand, nor the means by which it was dishonored, nor matter of excuse or waiver. Whatever legally fixes the promisor with dishonor, is sufficient, on due notice given, to charge the indorser. If, for instance, the promisor had absconded before the note is due, without having made provision for its payment,

so that no presentment and demand can be made, that is a dishonor, of which the holder may, immediately after the note has become due, notify the indorser; or if the promisor has agreed that notice left at a particular place shall be deemed a good substitute, and notwithstanding notice is so left, he does not make payment, this is likewise a dishonor.

But without considering further what constitutes a dishonor, it may be useful to examine more particularly, in reference to the present case, the authorities in relation to the effect and purport of the notice to be given to an indorser. The rule is laid down in general terms by the text-writers, that notice is to be given of the fact of dishonor. Bayley states the duty of the holder. He is under an implied undertaking to every party to the bill or note, who would be entitled to bring an action on paying it, to present, in proper time, the one for acceptance and each for payment; to allow no extra time for payment, and to give notice without delay to such person, of a failure in the attempt to procure a proper acceptance or payment. Bayley, Bills, 1st Am. ed. 124.

In general, it is incumbent on the holder to give notice of the dishonor to those persons to whom he means to resort for payment; otherwise they will be discharged. Chitty, Bills, 393.

In *Tindal v. Brown*, 1 T. R. 167, and 2 T. R. 186, note, it was held that no particular form of notice was necessary, but that such notice must come from the holder of the bill or note, or some party to it, and that mere knowledge of the fact of non-payment, coming to the indorser from any other source, would not be sufficient. It ought to purport that the holder looks to him for payment. The Court do not say, in terms, that the notice must directly, or by implication, state the fact of dishonor, but it is implied. The case decides that the holder must do an act, electing to assert his right to recover the note of the indorser, which right can only exist in case of a dishonor of the promisor. The case did not call for a decision as to what must be the tenor or purport of the notice, as to the fact of dishonor. It ought, said Mr. Justice *Buller*, to purport that the holder looks to him (the indorser) for payment. In regard to this it may be remarked, that when notice is given by the holder to the indorser, of the dishonor of a note, it necessarily implies that he looks to him for payment. That is the natural, and may in general be regarded as the necessary inference from the fact of giving such notice.

This question seems not to have arisen in England until a recent period ; but since the point has been started, there have been a series of decisions on the subject. The first was *Hartley v. Case*, 4 Barn. & C. 339 ; s. c., 6 Dowl. & Ryl. 505. The notice from the holder was, " I am desired to apply to you for the payment of the sum of £150, due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." The Court held it insufficient, because it did not apprise the party of the fact of dishonor. They said, the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. This was in 1825.

The next case was that of *Solarte v. Palmer*. On a trial before Lord *Tenterden*, he expressed an opinion, that the notice was insufficient. A bill of exceptions was taken, and the case brought before the Exchequer Chamber, who confirmed the decision. 7 Bing. 530 ; 5 Moore & P. 475 ; 1 Crompt. & J. 417 ; 1 Tyr. 371 ; On appeal to the House of Lords, the judgment was affirmed. 8 Bligh, N. R. 371, 874 ; s. c., 2 Cl. & Fin. 93 ; 1 Bing. N. R. 194 ; 1 Scott, 1.

The action was brought by the assignees of a bankrupt, and the notice was given by the attorneys of the assignees. It described the bill, and stated that it had been put into their hands by the assignees, with directions to take legal measures for the recovery thereof, unless immediately paid.

In giving judgment in the Exchequer Chamber, *Tindal*, C. J., states the rule to be, that the notice does not require the formality of a regular protest, but it should at least inform the party to whom it is addressed, either in express terms, or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment. This was decided in the House of Lords, June, 1834.

The next case, I believe, is that of *Boulton v. Welsh*, 3 Bing. N. R. 688 ; s. c., 4 Scott, 425. The notice to the indorser was thus : " The promissory note for £200, drawn by, &c., dated 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount thereof forthwith." It was strongly urged

that the words *returned unpaid* would import to the understanding of mercantile men that the note had been dishonored. But the Court held themselves bound by the case of *Solarte v. Palmer*, and believing this case to be within it, held the notice insufficient, although all the judges expressed their regret at the result. But they state the rule of law, as it had before been stated, that the notice should show a presentment to the maker, a demand of payment, and a refusal. As to any thing further than the general rule, this case is of no authority, unless in a case where the form of notice is precisely the same. Whether in such case the words *returned unpaid* would import the fact of dishonor, would depend much upon the usage of each mercantile community in which they should be used, and the conventional use and meaning of particular forms of expression used in such community. This was a decision of the Court of Common Pleas, Easter term, 1837.¹

About the same time was decided, in the Court of Exchequer, the case of *Hedger v. Steavenson*, 2 Mees. & W. 799, where the attorney addressed a letter to the defendant, informing him that his note, describing it, became due the day before, and had been returned unpaid, and requested him to remit the amount, with 1s. 6d. noting; and the notice was held to be good.

The case of *Messenger v. Southey*, 1 Man. & G. 76, and 1 Scott, N. R. 180, was decided in the Court of Common Pleas, in 1840. The notice was as follows: "This is to inform you that the bill I took of you for 15*l.* 2*s.* 6*d.* is not took up, and 4*s.* 6*d.* expense; and the money I must pay immediately." Held, it was insufficient, because it did not state or intimate, by intelligible inference, that the note had been dishonored.

About the same time, the case of *Lewis v. Gompertz*, 6 Mees. & W. 399, came before the Court of Exchequer. The notice from the holder to the indorser stated that the bill bearing his indorsement had been presented to the acceptor, and returned dishonored, "and now lies overdue and unpaid with me, as above, of which I give you notice." This was held sufficient, as giving all the requisite information, although it did not, in terms, require payment of the indorser.

The remarks of Mr. Baron *Parke*, in this case, are well worthy of consideration, as showing the extent to which the Court considered the authority of *Solarte v. Palmer* as going, and the qualifications with which it is to be taken.

¹ *Boulton v. Welsh* was overruled in 1842 by *Robson v. Curlew*, Car. & M. 378.

In *Grurgeon v. Smith*, 6 Adol. & Ellis, 499, the notice to the drawer of a bill was, that the bill had been returned with charges; and the immediate attention of the drawer to it was requested. This was held sufficient, as implying a demand and refusal, and noting for non-payment.

See *Houlditch v. Cauty*, 4 Bing. N. R. 411; s. c., 6 Scott, 209; *Strange v. Price*, 10 Adol. & Ellis, 125; *Burgh v. Legge*, 5 Mees. & W. 418; *Shelton v. Brothwaite*, 7 Mees. & W. 436; *Cooke v. French*, 3 Per. & D. 596; s. c., 10 Adol. & Ellis, 131, note.

These are all recent cases, bearing more or less directly upon the question, but do not essentially vary the result. Where, in the notice, it is stated that the bill has been noted, or returned with charges of protest, or the like, it is held to be notice, by reasonable implication of the fact of dishonor.

It was contended at the argument, that although it has been settled by recent authorities in England, that the notice to the indorser must state the fact of dishonor, yet that the American authorities would show that it was unnecessary. It becomes therefore necessary to examine and compare them.

Mills, in error, v. U. S. Bank, 11 Wheat. 431.¹ The note was in terms payable at the branch of the U. S. Bank at Chilicothe, and indorsed by the original defendant, plaintiff in error. It was demanded at the proper time at the bank, but there being no person there ready and willing to pay the same, it was immediately protested, and notice given to the defendants. The notice described the note by the date and amount, the time and place of payment, and as a note on which the defendant was indorser, and stated thus: "which has been protested for non-payment and the holders thereof look to you" (Signed by the Mayor of Chilicothe acting as notary, and addressed to the defendant). It was objected that the notice was defective, because it did not state who was the holder; because there was a misdescription of the date; and because it did not state that a demand had been made at the bank, when the note was due. As to the misdescription, it was held to be of no importance, if there was no other note to which it could apply, if it was so described as to indicate the note in suit, and if it did not mislead.

As to the sufficiency of the notice, the opinion was delivered by Mr. Justice *Story*. Some particular expressions, taken alone,

¹ *Ante*, 358.

would seem to warrant the position for which it is cited. But taking the whole together, and in reference to the case then before the Court, we think it is not opposed to the rule as stated in the English cases. Speaking in reference to the first objection, that the notice did not state who was the holder, the judge says, "no form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent, that payment has been refused by the maker; that he is considered liable; and that payment is expected of him."

In reference to the objection, that it did not state that payment was demanded at the bank when the note became due, he says: "It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity." He then speaks of the fact of presentment and demand, as matter of fact to be proved, and adds, "a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded on his having complied with the requisitions of law against the indorser." One of these requisitions is, of course, presentment and demand. And the learned judge concludes, upon this point, by adding, that "in point of fact the general, if not universal practice is, not to state in the notice the mode or place of demand, but the mere naked non-payment."

In the case then before the Court, the notice contained a full and precise statement of the presentment, demand, and non-payment by the maker. The objection with which the Court were dealing was, that the notice did not specify the time and place of demand. The answer made was, that such particularity was unnecessary, and that it is sufficient that it states the fact of non-payment. Applied to the facts of that case, it may be construed to mean non-payment after due presentment. So when the learned judge speaks of the practice of commercial cities, he speaks of notice of the mere naked non-payment, in contradistinction to stating, in the notice, the mode and place of demand. That such is the meaning, may be inferred from the passage before cited, in which he speaks of the object of the notice, which is to inform the indorser that payment has been refused by the maker. Refusal implies non-payment on demand, or under such circumstances as render a presentment and demand unnecessary. Indeed, in many cases, simple notice of non-payment is notice of dishonor; as where the

note is in terms, or by usage or special agreement, payable at a bank, a notice stating the date and terms of the note, showing that it has become due, and averring that it is unpaid, is equivalent to an averment that it is dishonored.

In *Smith v. Whiting*, 12 Mass. 6, no question was raised as to the sufficiency of the notice. It was notice from a bank. It described the note as due and unpaid; and by usage it was held to be payable at the bank. Of course it was dishonored, by not being paid at the bank by the maker.

So in *State Bank v. Hurd*, 12 Mass. 172, notice was left at a place agreed by the parties as a substitute for notice at the house or place of business of the maker; and it was held sufficient, being equivalent to a more formal demand; and failure of the promisor to pay, on such notice, rendered the indorser liable.

The case of *Bank of Rochester v. Gould*, 9 Wend. 279, is a case of mere misdescription. The notice to the indorser stated expressly that the note had been protested for non-payment; and the only question was, whether it was well described. It therefore does not affect the present question.

The case of *Bank of United States v. Carneal*, 2 Peters, 543, may be considered as throwing some light on the subject of inquiry. It is held, that when the note is payable at a bank, and the bank is itself the holder of it, no demand is necessary. It is the duty of the maker to go to the bank within the usual hours of business and pay it; and if he fail to do so, the note is dishonored. Towards the close of the opinion, given by Mr. Justice *Story*, it is stated thus: "A suggestion has been made at the bar, that a letter to the indorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also informs the indorser that he is looked to for payment. But where such notice is sent by the holder, or by his order, it necessarily implies such responsibility over. The purpose may be reasonably inferred from the nature of the notice."

We have thus attempted, at the risk of being somewhat tedious, to ascertain what the rule is upon this subject, on account of the extreme importance of certainty and uniformity in the rules of law applicable to the rights and duties of holders and other parties to notes and bills of exchange. And we take that rule to be, that as an indorser is liable only conditionally for the payment, in case of a dishonor of the note at its maturity by the maker, and notice

thereof to the indorser, in order to charge him, notice of such dishonor must be given him by the holder or his agent, or some party to the bill; that mere notice of non-payment, which does not express or imply notice of dishonor, is not such notice as will render the indorser liable.

In order to apply the rule thus stated, to the present case, it will be necessary to look at the facts stated in the report. It appears that the presentment and demand on the promisor were made on the morning of the day on which the note fell due. Afterwards, at about eleven o'clock, the plaintiff caused a written notice to be left at the defendant's dwelling-house, of which the following is a copy: "Boston, May 4, 1838. Mr. Louis Dennis. Sir, — I have a note signed by C. E. Bowers and indorsed by you for seven hundred dollars, which is due this day and unpaid; payment is demanded of you. C. C. Gilbert."

This notice comes from an individual, not from a bank. It was delivered at eleven A.M. There would then be no default and no dishonor, unless a demand had been made on the promisor. An averment, therefore, that it was unpaid, did not, by necessary implication or reasonable intendment, amount to an averment or intimation that payment had been demanded and refused, or that the note had been otherwise dishonored. The Court are therefore of opinion, that the notice was not sufficient to render the indorser legally liable.

It will be seen that there is some confusion among the English authorities on this subject; and we cannot perhaps do better than to add to Chief Justice Shaw's review the opinion of Lord *Denham*, in *Furze v. Sharwood*, 2 Q. B. 388, 409. He says: —

"Lord *Mansfield*, after observing, in the case of *Tindal v. Brown* [1 T. R. 167; 2 T. R. 186], that certainty is of the highest importance in mercantile transactions proceeded to settle the question there raised, whether the notice of dishonor was, in point of law, too late. The whole Court affirmed that proposition, and more than once set aside a verdict founded on the opposite assumption. Nothing more was required for the decision. But Mr. Justice *Willes* took a second objection; and Mr. Justice *Ashurst* a third. 'Notice,' said his lordship, 'means something more than knowledge; because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay; but (it ought to be further said) that he (the holder) does not intend to give credit. In the present case, there is no notice: for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser.' This is repeated with great approbation by *Butler, J.* Near forty years after, the sufficiency of a notice of dishonor was canvassed in an action between

Hartley v. Case [4 Barn. & C. 339], decided by Lord *Tenterden* at Nisi Prius. It ran thus: 'I am desired to apply to you for the payment of the sum of £150, due to myself on a draft drawn by Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place.' The report says: 'The Lord Chief Justice was of opinion, as this letter did not apprise the party of the fact of dishonor, but contained a mere demand of payment, it was not sufficient; and the plaintiff was nonsuited.' After argument, on a rule for setting aside the nonsuit, his lordship said: 'There is no precise form of words necessary to be used in giving notice' of dishonor, 'but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice; it does not even say that the bill was ever accepted. We therefore think the notice was insufficient.' This short judgment, in which the whole Court concurred, comprising *Bayley*, *Holroyd*, and *Littledale*, J.J., is perfectly correct in its statement of the fact and the law, and has the merit of adhering closely to the point raised in argument. It has never been questioned by any judicial authority. The same learned Chief Justice was afterwards called upon to decide on the sufficiency of the following notice: 'A bill of £683, drawn by' A, upon B C, 'and bearing your indorsement, has been put into our hands by the assignees of Mr. J. R. de Alzedo, with directions to take legal measures for the recovery thereof, unless immediately paid to, gentlemen, your very obedient servants, J. and S. P.' Here was no statement of the dishonor, the presentment, or the acceptance. If any notice of the dishonor, as a distinct fact, is necessary, this document is plainly worthless. It was so held by Lord *Tenterden*; but, from the magnitude of the sum and the importance of the question, his lordship suggested that a bill of exceptions might be tendered. This was done, and the case brought by writ of error into the Exchequer Chamber, when, as might have been expected, the Lord Chief Justice delivered a unanimous judgment, that Lord *Tenterden's* direction to the jury was right, and the notice insufficient. It was, however, thought right to bring the matter before the House of Lords, where the late Mr. Justice *Parke* delivered the opinion of all the judges present (nine in number) to the same effect. Thus, without one dissentient voice, the judges of all the courts, on these different occasions, concurred with Lord *Tenterden* in holding express notice of the fact of dishonor to be necessary; the only point on which he had given an opinion. This was the celebrated case of *Solarte v. Palmer* [7 Bing. 530; s. c., 1 Bing. N. C. 194]. The Lord Chief Justice, in the Exchequer Chamber, laid down this rule, that 'The notice of dishonor should at least inform the party to whom it is addressed, either in express terms, or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment of the amount.' *Parke*, J., when delivering the judges' opinion to the lords, omits the latter clause, and merely says, that 'such a notice ought, in express terms, or by necessary implication, to convey full information that the bill had been dishonored.' This decision, therefore, did not turn upon or require any allusion to the doctrine of *Ashhurst* and *Buller*, J.J., in *Tindal v. Brown*, on the necessity of stating that the holder looks to the party addressed, and does not give credit to any other person. But much controversy has arisen on the branch of the notice, as to which the Lord Chief Justice and *Parke*, J., agree, requiring notice of dishonor in express terms, or by necessary implication; and

hence the task of examining all the decisions is imposed upon us. In *Grugeon v. Smith*, this Court held the dishonor of a bill to be sufficiently notified by the phrase 'The bill is this day returned with charges.' A few days after, but without being aware of this decision, the Court of Common Pleas, *Boulton v. Welsh* [3 Bing. N. C. 688], held the notice insufficient, where it is said: 'The promissory note' 'became due yesterday, and is returned to me unpaid;,' the Lord Chief Justice there observing, that he did not see how it was 'possible to escape from the rule established by the two decided cases, without resorting to such subtle distinctions as would make the rule itself useless in practice. The rule requires that, either expressly or by necessary inference, the notice shall disclose that the bill or note has been dishonored.' Upon which we will merely observe in passing, that there is no necessary difference of opinion between the two courts, as *Parke, B.*, supposed in *Hedger v. Steavenson* [2 Mees. & W. 799]. The Common Pleas might have held, that 'returned with charges' did necessarily imply presentment and dishonor. And it does not follow from anything we said, that we might not have thought 'returned to me unpaid' insufficient. But the case of *Hedger v. Steavenson* brought the Court of Exchequer into direct collision with the Common Pleas, not indeed on the sufficiency of the notice, for it was not identical in the two cases, but on the principle of deciding. The note, &c., 'is returned unpaid,' was the form which the Common Pleas held wrong. The same form, with the addition of *1s. 6d.* for noting, the Exchequer held right: and *Parke, B.*, while submitting to the authority of *Solarte v. Palmer*, excepts to the reasons given for the judgment, and the language in which they are couched, and doubts whether he could go so far as to say that 'it ought to appear upon the face of the instrument "by express terms or necessary implication, that the bill was presented and dishonored";' thinking it 'enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him.' He remarks, however, that, even if the rule were properly laid down in those words, it ought to receive a more liberal construction than the Common Pleas appeared to have adopted, in which sentiments Barons *Bolland* and *Alderson* agreed, having been two of the judges consulted by the lords when *Parke, J.*, promulgated their opinion there. The next case, in order of time, is *Houlditch v. Cauty*. There the general doctrine was discussed; and the Lord Chief Justice declared his adherence to *Boulton v. Welsh*, but distinguished the case then before him. The sufficiency of the written notice was not directly in question; for it had been followed by a verbal communication between the plaintiff and defendant. *Strange v. Price* [10 Ad. & E. 125] followed. This Court there held it insufficient to 'inform Mr. James Price' 'that Mr. John Betterton's acceptance, £87 *5s.*, is not paid.' *A fortiori*, the Common Pleas would have agreed with us. I do not believe that the Exchequer would have differed. In Easter term, 1840, doubts springing from the same fruitful source were stirred in the Court of Common Pleas (*Messenger v. Southey*, 1 Man. & G. 76), and the Exchequer (*Lewis v. Gompertz*, 6 Mees. & W. 399); the former condemning, the latter supporting, the notice in those respective cases but the forms were so entirely different, that the judgments given might have been consistently formed by either Court. But *Messenger v. Southey* shows a great relaxation of the rigor of the rule laid down in the Exchequer Chamber and House of Lords, on the part of the Lord Chief Justice, who admits that *Grugeon v. Smith* might have been well decided by force of the words 'returned with

charges,' and possibly *Hedger v. Steavenson* also, because the notice declared the bill to have been 'returned unpaid.' But these are the very words which were held insufficient under the operation of the rule in *Boulton v. Welsh*, a case decided by the Common Pleas reluctantly, from deference to what was decided in *Solarte v. Palmer*, and which can hardly be now deemed a satisfactory authority. Upon the whole, it is to be feared, that none of the rules for construing this branch of the instrument designed to be a notice of dishonor will be found capable of very general application. The advantage of clear and certain rules, where it can be secured, is, indeed, inestimable. Perhaps Lord *Mansfield* never conferred so great a benefit on the commercial world as by his decision of *Tindal v. Brown*, where his perseverance compelled them, in spite of themselves, to submit to the doctrine of requiring immediate notice as a matter of law. But in the matter in hand we can scarcely hope to attain such a rule. For if we are to refer the question to a reasonable intendment, and what a man of business would naturally conclude from the words, we can hardly decide it without the intervention of a jury, whose opinions will naturally vary with the circumstances of each case; and if, on the other hand, the Court must decide on examination of the document according to legal and grammatical rules of interpretation, we shall frequently give it a sense in which neither party could ever have understood it. If we adopt the middle course, requiring at least a necessary implication, but qualifying these words by Lord *Eldon's* comment in *Wilkinson v. Adam*, we have just seen that (if the reports be accurate) the same eminent judge, who gave them one sense in *Boulton v. Welsh*, may admit them to be susceptible of a sense directly opposite in *Hedger v. Steavenson*. This rule, however, was recommended by great authority, twice asserted by the Court of Exchequer, not repudiated by the Court of Common Pleas. Perhaps it goes no farther than to require that the Court must see that, by some words or other, notice of dishonor has been given. We have entirely excluded the supposition, that the mere fact of making a communication respecting the non-payment of the bill at the proper season can extend the meaning of the words conveying notice of dishonor. This exists in almost every case; and, as one can hardly conjecture any other motive for giving the information, so the party addressed can hardly fail to infer that it is given in order to fix him with liability. Yet no one disputes that the fact must be stated, the notice of dishonor plainly given. But, if this be done, we may now inquire where is the authority establishing the position of *Ashhurst* and *Buller, J.J.* (unnecessary for the case before them), that the notice must also tell the party addressed that he looks to him for payment? If not, why send the notice? True, he may have some other reasons for informing the party addressed of the dishonor, while looking elsewhere for his money. But, unless he tells him this, the receiver of such a notice cannot but be certain that the sender means to call upon him for payment. The protest, for which notice was substituted, has no such clause, but begins and ends with the history of the dishonored bill, including the protest itself. Where notice has been given by another party than the holder, there may be good sense in requiring that it shall be accompanied by a direct demand of payment, or a statement that it will be required of the party addressed; but in no case has the absence of such information been held to vitiate a notice in other respects complete, and which has come directly from the holder. Nothing now remains but to declare our opinion on the several forms of notice set forth in the special verdict. And the second, of July 11th;

the third, July 20th; the fourth, July 13th; the fifth, September 11th; the sixth, September 25th; and the eighth, September 26th; we think bad, because they contain no notice of dishonor according to any of the decisions, or within any of the rules. Consistently with all that is set forth, the plaintiff, either from ignorance or inadvertence, or because he may really have looked to another, may have abstained altogether from presenting any one of these bills. But this amount reduces the plaintiff's claim below the defendants' set-off. Our judgment must then be for the latter, even on the supposition that it would be against them on all the important general points that have been raised."

Boulton v. Welsh, cited so frequently above, was overruled in Robson v. Curlew, Car. & M. 378; s. c., 2 Q. B. 421. So the English rule now is not so strict perhaps as the American rule declared in Gilbert v. Dennis.

Rauney, J., in Townsend v. Lorain Bank, 2 Ohio State, 355, quotes the rule in the principal case of Gilbert v. Dennis with approval, and states that to be the present rule in New York, Massachusetts, Pennsylvania, and Ohio. See also Pinkham v. Macy, 9 Met. 174; Clark v. Eldridge, 13 Met. 96; Ransom v. Mack, 2 Hill, 587; Arnold v. Kinloch, 50 Barb. 44; Dole v. Gold, 5 Barb. 490; Etting v. Schuylkill Bank, 2 Barr, 356; Sinclair v. Lynch, 1 Spears, 244; Graham v. Sangston, 1 Md. 60; Armstrong v. Thruston, 11 Md. 148, 157; Lockwood v. Crawford, 18 Conn. 361.

That the rigor of the early English rule in Solarte v. Palmer, has been considerably relaxed, may be seen in Caunt v. Thompson, 7 Com. B. 400, 410, decided in 1849, and in Metcalfe v. Richardson, 20 Eng. L. & Eq. 301; 11 Com. B. 1011, decided in 1853. In the former case, Cresswell, J., said: "In Solarte v. Palmer, which was finally decided in the House of Lords, a very strict rule was adopted; but that has not been adhered to." And it was held in this case that knowledge derived from the holder that the bill has been dishonored, where the drawer is himself the party who is to pay the bill, as when he is executor of the acceptor, amounts to notice. See *post*, p. 428. In Metcalfe v. Richardson, *supra*, it was held that the jury might infer dishonor from a statement that the acceptor "could not pay." See also Lewis v. Gompertz, 6 Mees. & W. 399; Armstrong v. Christiani, 5 Com. B. 687; Houlditch v. Cauty, 4 Bing. N. C. 411; Smith v. Boulton, 1 Hurl. & W. 3.

Notice without date, stating that the paper has been "this day presented for payment" is fatally defective. Wynn v. Alden, 4 Denio, 163.

The word "protested" in the notice, clearly implies dishonor. 1 Parsons, Notes and Bills, 471; citing Crawford v. Branch Bank, 7 Ala. 205; Spies v. Newbury, 2 Doug. Mich. 495; DeWolf v. Murray, 2 Sandf. 166, and other authorities.

See further upon this branch of the subject, Clark v. Eldridge, 13 Met. 96; Everard v. Watson, 18 Eng. L. & Eq. 194; Dole v. Gold, 5 Barb. 490; Cayuga Bank v. Warden, 1 Comst. 413; Story, Promissory Notes, §§ 350, *et seq.*

The third rule, which was also followed quite strictly at one time, — requiring the notice to state that the holder looks to the party to whom it is addressed for indemnity, — has lost much of its force, and become nearly obsolete. Story, Promissory Notes, § 353.

It is stated in Solarte v. Palmer, 7 Bing. 530, *supra*, that such information should be given to the drawer or indorser either expressly or by necessary implication; but it is the more recent doctrine that the very fact of notice necessarily implies that the holder looks to the party notified for payment. Chard v.

Fox, 14 Q. B. 200; Furze v. Sharwood, *supra*; King v. Bickley, 2 Q. B. 419; Miers v. Brown, 11 Mees. & W. 372; Metcalfe v. Richardson, 20 Eng. L. & Eq. 301; Caunt v. Thompson, 7 Com. B. 400; Townsend v. Lorain Bank, 2 Ohio State, 354; Bank of the United States v. Carneal, 2 Peters, 543; Cowles v. Harte, 3 Conn. 316; Warren v. Gibnan, 17 Maine, 360; Barstow v. Hiriart, 6 La. An. 98; Burgess v. Vreeland, 4 Zab. 71; Story, Promissory Notes, § 354; 1 Parsons, Notes and Bills, 472.

STEPHEN B. MUNN v. LUKE BALDWIN *et al.*

(6 Massachusetts, 316. Supreme Court, March, 1810.)

Manner of sending notice. Post-office.—Putting a letter into the post-office, directed to the indorser of a bill of exchange, and containing notice of protest for non-payment, is sufficient, though it does not appear that the letter was ever received.

ASSUMPSIT upon a bill of exchange drawn in Boston on Justin Smith, of Philadelphia, in favor of the defendants, and by them indorsed to the plaintiff.

The facts agreed were, that the notary in Philadelphia, who protested the bill for non-payment, on the day of the protest, or on the morning of the next day, before the mail for Boston was closed, put a letter into the post-office in Philadelphia directed to the defendants in Boston, and containing the necessary notice; but the case adds: “It does not appear that the defendants ever received that letter.”

PARSONS, C. J. The only question in this action is, whether the defendants had legal notice of the protest for non-payment of the bill of exchange. After taking a little time to advise, we are all of opinion that the notice is *prima facie* sufficient. The holder of the bill made use of the usual mode of conveying notice, by putting the letter containing it into the post-office; and a mode to which the indorsers must be considered as assenting, or the negotiating of bills payable at a distance would be greatly embarrassed, if not obstructed. For who would buy a bill, to be presented for payment in a remote part of the United States, if it was to be understood, that if not paid, he must be at the expense of some private messenger, whose accidental sickness or detention on the road would defeat his remedy?

When a letter is put into the regular post-office, we presume that

it was sent and received agreeably to its direction, unless the contrary is proved. Here there is no evidence on that point; the case only stating, that it does not appear that the letter was received by the defendants; and yet, they might, in fact, have received it. If it was agreed that the letter miscarried, and that the defendants did not receive it, it might be a question at whose risk the letter was sent by the mail; and whether, the regular mail being the method of conveyance assented to by the defendants, they must not be answerable for the miscarriage, in the same manner as if a letter sent by their private servant had not been delivered by him. On this last point, however, it is not necessary now to decide. But on the facts stated, we are satisfied that the notice must be considered as sufficient to make the indorsers liable, and that the plaintiff ought to recover.

Therefore, conformably to the agreement of the parties, let the defendants be called.

See the following authorities: *Saunderson v. Judge*, 2 H. Bl. 500; *Scott v. Lifford*, 9 East, 347; *Leftley v. Mills*, 4 Term, 174; *Shed v. Brett*, 1 Pick. 401; *Jones v. Wardell*, 6 Watts & S. 399; *Walker v. Stetson*, *post*, 397; *Chitty, Bills*, 658; *Story, Promissory Notes*, § 328; *Ibid.*, *Bills of Exchange*, § 300 and cases cited. These authorities further show that it is wholly immaterial whether the notice ever reached the indorser or drawer or not. If the notice is duly mailed, the liability is absolutely fixed. This of course is said of the case of an indorser residing in a different town from that of the holder. If he lives in the same town the notice should not be sent by mail, except where there is a penny-post. *Pierce v. Pendar*, 5 Met. 352; *Ransom v. Mack*, 2 Hill, 587; *Bank of Columbia v. Lawrence*, 1 Peters, 578, *post*, 404, 407. This subject is more fully considered, in *Bowling v. Harrison*, *infra*. As to the employment of messengers to serve notice, it is decided that if the holder resorts to this method, instead of using the public mail, his responsibility continues until delivery of the notice, either personally to the party to be charged, or at his place of business or residence. See *post*, pp. 408, 409, 410.

JOHN D. BOWLING, Plaintiff in Error, *v.* JILSON P.
HARRISON.

(6 Howard, 248. Supreme Court of the United States, December, 1847.)

Notice to be given personally, when. — If the parties reside in the same city or town the indorser is entitled to personal notice of the dishonor of the bill or note, either verbally or in writing, or a written notice must be left at his dwelling-house or place of business. Notice by the mail in such case is not sufficient. And a memorandum on a note, in these words: "Third indorser, J. P. Harrison, lives at Vicksburg," is not an agreement to receive notice through the post-office.

THE case is stated in the opinion of the Court.

GRIER, J. The first assignment of error in this case is to the instruction given by the Court to the jury: "That, to charge an indorser if he lived in the town in which the note was made payable, the notice must be personal, unless he had agreed to receive it elsewhere, or unless, by custom and usage of the bank at which the note is payable, the notice of non-payment was left at the post-office."

As the only question on the trial of the cause was the sufficiency of notice left at the post-office at Vicksburg, to charge an indorser residing there, and not whether a copy left at his dwelling-house or place of business would be proper, the phrase "personal notice" was evidently intended and understood to include the latter in opposition to the former. This instruction is, therefore, not objected to on the ground of any inaccuracy of expression on that point. But the complaint is, that the rule of law on this subject was erroneously enunciated by the Court, in stating the conditions under which a personal service of notice on an indorser is required to be "residence in the town where the note was made payable."

It is true, the terms in which the rule of law on that subject is usually stated differ from those used by the Court on this occasion. In *Williams v. United States Bank*, 2 Peters, 96, 101, it is thus stated by this Court: "If the parties reside in the same city or town, the indorser must be personally noticed of the dishonor of the bill or note, either verbally or in writing, or a written notice must be left at his dwelling-house or place of business."

Mr. Justice *Story*, *Story, Bills*, § 312, states the rule in these words: "Where the party entitled to notice and the holder reside

in the same town or city, the general rule is, that the notice should be given to the party entitled to it, either personally, or at his domicile or place of business."

The indorsee or owner of the note in this case resided in Maryland, and the indorser in Vicksburg; and it is contended that, as they are the only parties, and do not reside in the same place, the rule is inapplicable to the case.

But we are of opinion that, whether we regard the reasons upon which this rule is founded, or a correct construction of the terms in which it is usually stated, the instruction given by the Court below was correct, and not such as to mislead the jury in the application of the law to the circumstances of the case before them.

The best evidence of notice is proof of personal service on the party to be affected by it, or by leaving a copy at his dwelling. Depositing a notice in the post-office affords but presumptive evidence of its reception, and is permitted to be substituted for the former only where the latter would be too inconvenient or expensive. Hence, when the convenience of the public post is not needed for the purpose of transmission or conveyance, there is no reason for its use, or for waiving the more stringent and certain evidence of notice; and therefore, in the practical application of the rule, the relative position of the person giving the notice and the party receiving it forms the only criterion of the necessity for relaxing it.

A very large portion of the commercial paper used in this country is similar to that which is the subject of the present suit. They are notes made payable at a certain bank. The last indorsee or owner transmits it to that bank for collection; if funds are not deposited there to meet it when due, it is handed to a notary or agent of the bank, who makes demand and protest, and gives notice of its dishonor to the indorsers; if they live in the same town or city where the bank is situated and the demand made, and "where the note was payable," he serves it personally, or at their residence or place of business; if they live at a distance, so that such a service would be inconvenient and expensive, he sends the notice by mail to the nearest post-office, or such other place as may have been designated by the party on whom it is to be served. This is and has been the daily practice and construction of the rule in question over the whole country, and the only one consonant with reason.

This practical application of the rule is correctly stated by the Court in their instruction to the jury as connected with the circumstances of the case before them, and also within its terms as it is usually stated in the books. The term "holder" is properly applied to the person having possession of the paper and making the demand, whether in his own right or as agent for another. The Planters' Bank of Vicksburg were the "holders" of this note for collection, and were bound to give notice to all the indorsers. *Smedes v. The Utica Bank*, 20 Johns. 372. The notary, also, who held the note as agent of the owner for the purpose of making demand and protest, may be properly considered as the "holder" within the letter and spirit of this rule. On a careful examination of the very numerous cases in the books in which the rule under consideration has been enunciated in the terms above stated, they will be found not essentially to differ from the present in their circumstances. In some instances, also, the rule has been stated in the terms used by the Court below. See Bayley, Bills.

An exception is taken, also, to the instruction of the Court: "That the memorandum attached to the note in this case was not a sufficient agreement to receive notice at the post-office, and to dispense with personal notice on the indorser; and that the custom and usage of the bank, as proved in this case, were not sufficient to dispense with personal notice."

The memorandum is in the following words: "Third indorser, J. P. Harrison, lives at Vicksburg." The only direct evidence of usage was, "that, for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicksburg to have notice served personally upon the indorsers resident in Vicksburg, unless there was a memorandum on the note designating a place where notice was to be served; then the notice was left at such place." This is, in fact, no usage peculiar to Vicksburg, but the general rule of commercial law. The notary appears to have mistaken this memorandum for an agreement to receive notice at the Vicksburg post-office; and, however willing to excuse himself, he has not ventured to swear directly that there was any known usage to justify this construction, or rather misconstruction, of this memorandum. The counsel for plaintiff in error complain that the Court did not submit it to the jury to say whether an inference might not be drawn, from some equivocal or obscure expressions of the witness, that there was such a usage.

It is true, the jury are the proper judges of the credibility and weight of testimony, but the Court should not instruct them to presume or infer important facts, unless there be testimony which, if believed, would justify such a conclusion.

It is of the utmost importance to commercial transactions, that the rules of law on the subject of notice which is to charge an indorser be stable and certain, and not suffered to fluctuate and vary with the notions or caprice of banking corporations or village notaries. A usage, to be binding, should be definite, uniform, and well known. It should be established by clear and satisfactory evidence, so that it may be justly presumed that the parties had reference to it in making their contract. Every day's experience shows that notaries, in many places, fall into loose ways of performing their duties, either through negligence or ignorance: and courts should be cautious how they encourage juries to presume usages and customs contrary to the settled rules of law, in order to sanction the mistakes or misconceptions of careless or incompetent officers. It was as easy to have written the memorandum on this note: "The indorser, J. P. Harrison, agrees to receive notice at the Vicksburg post-office," as to write it in its present form; and one can hardly conceive of the possibility of a well-known and established usage, that a written memorandum should be construed without any regard to its terms or plain meaning. Those who affirm the existence of such a strange usage should be held to strict proof of it; and the Court were right in not submitting it to the jury to infer such an improbable and unreasonable custom, by forced or astute construction of equivocal expressions from a willing witness.

Let the judgment be affirmed.

The rule established in the above case has been followed throughout the Union, though its reasonableness has in several instances been questioned; and the rule itself has been circumscribed within narrow limits.

In 1 American Leading Cases, 403, it is said that the rule "has lost its reasonable force, and exists only by authority."

In *Eagle Bank v. Hathaway*, 5 Met. 212 (1842), the rule is qualified to this extent: That where the parties to the transaction to be notified live in different places, a holder may send notice to an indorser residing in a different place, and the latter may use the mail to notify a prior party in the same place. The same doctrine substantially is held in *Manchester Bank v. Fellows*, 8 Foster, 302, and in *Warren v. Gilman*, 17 Me. (5 Shepl.) 360. In *Eagle Bank v. Hathaway*, Shaw, C. J., said: "Were it an original question, it is far from certain that no-

tice by the post-office would not frequently reach an indorser as soon and as certainly as notice at his domicile. Perhaps in large commercial cities, where bankers, merchants, and active men of business usually send to the post-office several times a day, notice by the post-office would be as prompt as any other. In smaller communities, however, and places more sparsely settled, such notice might be likely to linger in the post-office. But it is not a new question. A long course of judicial decisions, either following or governing the usage of merchants and men of business, has settled it."

The rule is again qualified in *Shaylor v. Mix*, 4 Allen, 351. In this case the cashier of the bank at which the paper in suit was payable, deposited in the post-office at Stockbridge a notice of the non-payment, addressed to the indorser at Curtisville (a distinct village within the town of Stockbridge) at which place (C.) the indorser lived, and where there was a post-office at which he usually received his letters. The notice was held good. It is proper to observe, however, that the notice was duly received by the indorser. *Bigelow*, C. J., said: "The general rule that notice of the dishonor of a bill or note may be sent by mail to a drawer or indorser who resides in a different city or town from that in which the holder resides, is founded on the universal usage of all persons engaged in commercial and other business transactions, to resort to the public post as a safe and certain medium of communication between places from and to which there is a regular transmission of the mails. Indeed, if such was not the rule, and it was necessary in order to charge a drawer or indorser either to give him personal notice of the dishonor of a bill or note or to leave a notice at the place of his domicile, it is obvious that in many cases a very serious burden would be put on the holder of negotiable paper, and its free circulation beyond the limits of the domicile of the parties would become almost impracticable. . . .

"The same reasons exist for holding a notice by mail sufficient, where the drawer or indorser and the person who is to give the notice reside in the same town, municipality, or district, but in distinct and separate villages, parishes, or settlements, at a distance of several miles from each other, between which there is a regular intercourse by mail, and where it is shown that the party to whom the notice is addressed is in the habit of receiving letters sent to him in the course of his business at the post-office of the village in or near which he resides. On the question, the fact that the parties both live within the territorial limits of a large town and under the same municipal government, may be quite immaterial. The real inquiry is, whether there are regular communications by mail from the place where the notice is deposited to that where the drawer or indorser resides, and a separate post-office in the latter place, to which he is in the habit of resorting to receive letters which are forwarded to him there by mail."

We have quoted so much at length from these important cases as indicating the tendency of the courts to take a departure from the old rule. See also note to *Bank of Columbia v. Lawrence*, *post*, p. 404.

The reasons set forth above for the exceptions mentioned, will apply with equal force to all our large cities in which letters are delivered by carriers several times a day; and so are the authorities. See *Story*, *Promissory Notes*, § 323; *Ibid.* *Bills of Exchange*, §§ 289, 291, 382; *Chitty*, *Bills*, 473; 3 *Kent*, *Com.* 107; *Pierce v. Pendar*, 5 *Met.* 352, 356; *Smith v. Mullett*, 2 *Camp.* 208; *Ransom v. Mack*, 2 *Hill*, 587; *Sheldon v. Benham*, 4 *Hill*, 129, 133; *Bank of Columbia v. Lawrence*, *post*, 404, 408.

F. & H. CHANOINE v. FOWLER.

(3 Wendell, 173. Supreme Court of New York, August, 1829.)

By whom notice should be given. — Notice of dishonor cannot be given by a stranger ; it should be given by the holder, or by one who is a party to it, and who would, on the same being returned to him, have a right of action on it.

ASSUMPSIT by the payees against the drawer of a bill of exchange. The circuit judge, in charging the jury, instructed them that if the defendant had information in due season of the non-acceptance of the bill, it was good, no matter who sent it.

MARCY, J. To determine whether the defendant had legal notice of the non-acceptance of the bill, it will be necessary to see when it was given, and from whom it came. Messrs. Sewalls had transmitted the bill to France, and received information of its non-acceptance on the fourth or fifth of April. H. D. Sewall says he did not himself give notice thereof to the defendant, nor does he know that notice was given by his house ; although it was their custom to give notice in such cases, and he has no doubt the defendant received it. He learned, from a conversation with the defendant between the time of receiving notice and the fourteenth of April, that he had knowledge that the bill was dishonored. The judge, at the trial, ruled that if the defendant had notice in due time of the non-acceptance of the bill, it was no matter whence it came, it was available to the plaintiffs. The rule of law in relation to the notice was, I apprehend, laid down in a manner too broad and unqualified. The rule has heretofore fluctuated ; but it never has been authoritatively stated, as I can find, to be as the judge laid it down on the trial, except in the case of *Shaw v. Coates*, at the sittings before Lord *Kenyon*, mentioned in Selwyn's N. P. 320, n. 25.¹ Repeated decisions since, both in term and at *nisi prius*, have qualified and restricted the broad proposition of the judge in this case, and of Lord *Kenyon* in the case of *Shaw v. Coates*. In some instances, it has been decided that the holders or their agents are the only persons to give notice of the dishonor of bills ; but it seems to be now settled that it is not absolutely

¹ This citation should probably be *Shaw v. Croft*, cited in Selwyn's N. P. 354.

necessary that the notice should come from the holder of a bill, but may be given by any person who is a party to it, and who would, on the same being returned to him, have a right of action on it. Chitty, Bills, 229; 2 Camp. 373; 1 Stark. 29; Bayley, Bills, 161. A notice from a mere stranger is not sufficient; and the charge of the judge was broad enough to sanction such a notice.

New trial granted.

The point determined in this case, that a stranger cannot give notice of dishonor, is well settled. See Story, Promissory Notes, § 301, and authorities cited. See also *Juniata Bank v. Hale*, *post*, 423, and note, 428. But as indicated by the Court, there has been some conflict in the cases upon the question whether a prior party having notice from the holder, may give notice to antecedent parties which shall be binding in favor of the holder. The earlier cases, however, of which *Tindal v. Brown*, 1 T. R. 167; s. c., 2 T. R. 186, is the leading case, may now be considered as overruled, and the doctrine established as stated in the principal case. *Chapman v. Keane*, 3 Adol. & Ellis, 193, decided in 1835. Lord Chief Justice *Denman*, in delivering the judgment of the Court in this case, said: "On the trial of this action by the indorsee against the drawer of a bill of exchange, the Lord Chief Justice of the Common Pleas directed a nonsuit for want of due notice of dishonor. The bill had been indorsed by the plaintiff by the desire of Wiltshire, who had discounted it and left it in the hands of the plaintiff's clerk, with instructions to obtain payment or give notice of dishonor. He did give notice to the defendant, but in the name of the plaintiff, not in that of Wiltshire, the then holder, who had deposited the bill with him."

The objection to the plaintiff's recovery was founded on the case of *Tindal v. Brown*, 1 T. R. 167; 2 T. R. 186; in which all the Judges of this Court, except Lord *Mansfield*, considered a notice given by one who was not the holder as no notice, on the ground that the drawer was not thereby apprised of the holder's intention to look to him for payment; and this case was distinctly recognized and its principle adopted by Lord *Eldon*, in *Ex parte Barclay*, 7 Ves. 597.

Notwithstanding these high authorities, it is clear from *Jameson v. Swinton*, 2 Camp. 373, *Wilson v. Swabey*, 1 Stark. 34, and also from the learned treatises on Bills of Exchange, that the contrary doctrine has prevailed in the profession; and we must presume a contrary practice in the commercial world. It is universally considered that the party entitled as holder to sue upon the bill may avail himself of notice given in due time by any party to it. In the *nisi prius* cases just referred to, no express allusion was made to *Tindal v. Brown*, or *Ex parte Barclay*; but we can hardly conceive that they were not present to the recollection of Lord *Ellenborough* and Mr. Justice *Lawrence*, or the counsel engaged. These learned judges indeed decided them at *nisi prius*, but without question. We are now compelled to determine whether the case of *Tindal v. Brown*, as to this point, be good law. We think that it is not. If it were, the holder might secure his own right against his immediate indorser by regular notice; but the latter and every other party to the bill would be deprived of all remedy against anterior indorsers and the drawer, unless each of those parties

should in succession take up the bill immediately on receiving notice of dishonor, a supposition which cannot reasonably be made. We may add that this point was not necessary for the decision of the case, as this Court, including Lord *Mansfield*, granted a new trial on a different ground."

The rule in this case is declared the settled law in *Harrison v. Ruseoe*, 15 Mees. & W. 231, 234, and in *Rowe v. Tipper*, 20 Eng. L. & Eq. 220, 222: opinion of *Jerris, C. J.*

The rule declared in *Tindal v. Brown*, *supra*, is stated with approval in *Harris v. Robinson*, 4 How. 336, though that point was not involved in the latter case. The question was whether a notary acting for a collecting bank — the agent of the holder — might give notice of dishonor, and it was held that he could.

The rule as declared above by Lord *Denman*, is stated to be the law in the text-books. Mr. Justice *Story*, *Promissory Notes*, § 302, says: "But a person who is a party to the note, is not ordinarily to be treated as a mere stranger in the sense of the rule [which denies the validity of notice by a stranger]. If he be a party to the note, and at all events if he be at the time entitled to call for payment or for reimbursement, notice from him will now be held sufficient, although formerly it seems to have been otherwise held." See, to the same effect, 3 Kent Com. 108; *Story*, *Bills of Exchange*, §§ 294, 303, 304; *Thompson*, *Bills*, 357, 358 (Wilson's ed. 1865); *Chitty*, *Bills*, 494, 495, and cases cited.

It is important to observe, however, that for the holder to avail himself of notice by a prior party to a still earlier party not notified by the holder, the latter must have given notice to such prior party. In other words, notice by a prior to a still earlier party will not avail the holder, if he has neglected altogether to give notice. His laches should not be excused by the diligence of another; he must have rendered this prior party liable to himself, in order to have the advantage of his notice. The same in reason should apply to an indorser who attempts to gain the benefit of notice given to an earlier indorser, by a party prior to himself. It must be admitted that the rule has not in every instance been clearly stated in this way, though Mr. Justice *Bayley* so states it. *Bills*, c. 7, § 2, pp. 254-256, 5th ed., where he says: "Though a holder or any other party give no notice *but to the person of whom he took the bill*, yet if notice be communicated without laches to the prior parties, he may avail himself of such communication." In *Thompson*, *Bills*, 357 (Wilson's ed. 1865), the rule is thus stated: "Although the holder of a bill or note *should give notice only to his immediate indorser*, he may avail himself of notice to any prior party, whether it proceeds from his indorser or from some earlier indorser, to whom the latter has given notice." *Story*, *Promissory Notes*, §§ 302, 303, states the doctrine in substantially the same language. *Ibid.*, *Bills of Exchange*, §§ 303, 304.

But if there be any doubt upon the point, the case of *Lysaght v. Bryant*, 9 Com. B. 46, settles the question. It was here held that the holder of a bill of exchange may, in an action against the drawer, avail himself of a notice of dishonor given in due time by any party to the bill *whose liability to the holder has been fixed*. Mr. Justice *Cresswell* said: "It seems, from the cases, that the holder of a bill may avail himself of a notice given in due time by a prior indorsee, provided he himself is in a condition to sue the party by whom the notice was given. Here *Lysaght the younger*, holding the bill as his father's agent duly presented it, and had it returned to him dishonored. Notice of that fact to

- him therefore, operating as notice to the firm, the present plaintiff was entitled to sue them, and consequently is in a condition to avail himself of the notice of dishonor given by them to the defendant."

Mr. Justice *Wilde* said: "As to the notice of dishonor, the case seems to fall within the authorities. The facts show that Lysaght and Smithett had due notice of the dishonor of the bill, — one of them having caused it to be presented, and having had it returned to him. A notice therefore by Lysaght and Smithett, then being under a liability to the present plaintiff, according to the authorities inures as a notice to the defendant." See also *United States Bank v. Goddard*, 5 Mason, 366, 372. *Turner v. Leech*, 4 Barn. & Ald. 451; *Roscow v. Hardy*, 12 East, 434.

The rule in the principal case will exclude the holder from taking advantage of notice from a party who has been discharged by laches or otherwise. *Harrison v. Ruscoe*, 15 Mees. & W. 231.

In two English cases it seems to have been held that notice by the acceptor of a bill will avail the holder. *Shaw v. Croft*, per Lord *Kenyon*, Chitty, Bills, 494 (1798); *Rosher v. Kieran*, 4 Camp. 87 (1814). But Mr. Justice *Bayley* explains this on the supposition that the acceptor in these cases had a special authority to give notice. Bills, 254, 5th ed. And it is said in *Thompson, Bills*, 359 (Wilson's ed. 1865), that "this explanation is now considered satisfactory, it being held as settled that an indorser is not bound to regard a notice unless it come from a party who would be entitled, on paying the bills, to demand reimbursement from him." Certainly the notice is bad if given by a drawee who refuses acceptance. *Stanton v. Blossom*, 14 Mass. 116.

As to the effect of notice to anterior parties in favor of intermediate indorsers, see next case.

SIMPSON v. TURNEY.

(5 Humphreys, 419. Supreme Court of Tennessee, December, 1844.)

Intermediate parties.—Notice given by the holder of a promissory note to the second indorser too late to fix his responsibility, will not avail an intermediate indorser, though it would have been in due time if given by him.

THE case is stated in the opinion of the Court.

REESE, J. The Branch Bank of the State of Tennessee was the holder of a promissory note, payable at said bank, made by James H. Jenkins, to Anthony Dibrell, and indorsed in the following order: A. Dibrell, S. Turney, and Jno. W. Simpson. Turney's residence is within one mile of the bank at Sparta, so known to be to the bank, and to all the other parties to the note. The note

was legally due on the first day of February, 1843, that being the third day of grace. It was on that day protested. On the second day of February no notice of the protest for the non-payment of the note was either served upon Turney personally, or left at his residence. He had notice from the bank, the holder, on the third day of February. John W. Simpson, the plaintiff, the immediate indorser of Turney, gave him no notice whatever.

These facts being specially found by the jury in the case, the Circuit Court gave judgment for Turney, and the plaintiff has appealed in error to this Court.

It is not insisted for the plaintiff here that the notice of the bank to Turney, the only notice he received, was in time. But it is urged, that if Simpson had given him notice on the day he received notice from the bank, such notice would have been good; and that is certainly so: and the plaintiff further insists, that the notice given by the bank shall inure to his benefit. If the notice had been in time and valid, it would by law have inured to his benefit, he being an intermediate party. But a notice of no benefit to the bank, because not fixing the liability of the party notified, cannot inure to the benefit of another. So to hold, would be to introduce a new principle into the law merchant. Suppose there were ten indorsers upon a note: if the holder ten days after the protest gave notice to the first indorser, this, according to the argument, would fix all the indorsers, for it would be just the time necessary to them to have given notice to each other successively.

It is perhaps a universal principle, where substitution exists at all, that the matter or thing to be substituted to must be valid and effective in behalf of the principal; if it be ineffectual in his behalf, it is difficult to see how it can inure to the benefit of others.

Upon the direct question raised in this case, Bayley on Bills expressly says: "Nor is it any excuse that there are several intervening parties between him who gives the notice and the defendant to whom it is given; and if the notice had been communicated through those intervening parties, and each had taken the time the law allows, the defendant would not have had the notice the sooner."

The same principle is also decided in the case of *Turner v. Leech*, 4 Barn. & Ald. 454.

We have been referred by the plaintiff to what has been said by

this Court in the case of *McNeil v. Wyatt*, 3 Humph. 125, 128. The bank at Lagrange in that case gave notice to one Glover on the 14th, to be served on Wyatt and McNeil. Wyatt was served on the 14th, and McNeil on the 15th. But Glover proved in the Circuit Court that he was the general agent of Wyatt, to serve notices for him when his name was on paper. And the Circuit Court left it to the jury to say whether Glover, who served the notice, was not Wyatt's agent as well as the agent of the bank; and if he was, then the notice to McNeil on the 15th, one day after Wyatt received notice, was sufficient.

This Court held that there was not any error in this part of the charge; and placing the validity of the notice, as this Court did, upon that special ground, is a distinct recognition of the general principle maintained by us in this case.

Upon the whole, we affirm the judgment.

That notice by the holder or any other party inures to the benefit of all intermediate indorsers, though they may not have notified the prior parties, when given in time to fix the liability of the notified party to him who gives notice, see *Marr v. Johnson*, 9 Yerg. 1; *Beale v. Parrish*, 20 N. Y. 407; *Palen v. Shurtleff*, 9 Met. 581; *Stanton v. Blossom*, 14 Mass. 116; *Chitty, Bills*, 494; *Story, Promissory Notes*, § 303; *Story, Bills of Exchange*, § 294. See also *Etting v. Schuylkill Bank*, 2 Penn. State, 355.

THE PRESIDENT, DIRECTORS, &C., OF THE BANK OF ALEXANDRIA, Plaintiffs in Error, *v.* THOMAS SWANN.

(9 Peters, 33. Supreme Court of the United States, January, 1835.)

When the notice should be sent. — It is sufficient to charge an indorser that notice of the default of the maker of a note be put into the post-office early enough to be sent by the mail of the succeeding day. The holder is not required to give notice the day upon which the demand was made.

THE case is stated in the opinion of the Court.

THOMPSON, J. This suit was brought in the Circuit Court of the District of Columbia, for the county of Alexandria, upon a promissory note made by Humphrey Peake, and indorsed by the

defendant in error. Upon the trial the jury found a special verdict, upon which the Court gave judgment for the defendant, and the case comes here upon a writ of error.

The points upon which the decision of the case turns, resolve themselves into two questions.

1. Whether notice of the dishonor of the note was given to the indorser in due time?

2. Whether such notice contained the requisite certainty in the description of the note?

The note bears date on the twenty-third day of June, 1829, and is for the sum of \$1400, payable sixty days after date at the Bank of Alexandria. The last day of grace expired on the twenty-fifth of August, and on that day the note was duly presented, and demand of payment made at the bank, and protested for non-payment; and on the next day notice thereof was sent by mail to the indorser, who resided in the city of Washington.

The general rule, as laid down by this Court in *Lenox v. Roberts*, 2 Wheat. 373, 4 Cond. 163, is, that the demand of payment should be made on the last day of grace, and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day. The special verdict in the present case finds, that according to the course of the mail from Alexandria to the city of Washington, all letters put into the mail before half-past eight o'clock P.M., at Alexandria, would leave there some time during that night, and would be deliverable at Washington the next day, at any time after eight o'clock A.M.; and it is argued on the part of the defendant in error, that as demand of payment was made before three o'clock P.M., notice of the non-payment of the note should have been put into the post-office on the same day it was dishonored, early enough to have gone with the mail of that evening. The law does not require the utmost possible diligence in the holder in giving notice of the dishonor of the note; all that is required is ordinary reasonable diligence; and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course of business. In the case of the *Bank of Columbia v. Lawrence*, 1 Peters, 578, 583,¹ it is said by this Court to be well settled at this day, that when the facts are ascertained, and are undisputed, what shall constitute due diligence is a question of law; that this is best cal-

¹ *Post*, 404.

culated for the establishment of fixed and uniform rules on the subject, and is highly important for the safety of holders of commercial paper. The law, generally speaking, does not regard the fractions of a day; and, although the demand of payment at the bank was required to be made during banking hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject. If the time of sending the notice is limited to a fractional part of a day, it is well observed by Chief Justice *Hosmer*, in the case of the *Hartford Bank v. Stedman and Gordon*, 3 Conn. 489, 495, that it will always come to a question, how swiftly the notice can be conveyed. We think, therefore, that the notice sent by the mail, the next day after the dishonor of the note, was in due time.

The second point in this case is given in full in the note to the case of *Mills v. Bank of the United States*, *ante*, p. 358, as illustrating the subject of misdescription in the notice. There is nothing in this part of the case relating to the time of sending notice.

In the case of several successive indorsements, the rule is that each indorser has the same time within which to notify antecedent parties, after the receipt of notice himself, that the holder has; and this, in the case of a daily mail to the place in which the party to be notified resides, is until the next day. But if no mail leaves the next day, or if a mail leaves before business hours, he need not post the notice until the next regular mail.

But the party, whether holder or indorser, must in all cases send his notices to antecedent parties at the same time that he would to his immediate indorser; he will not be allowed as many days as there are intermediate parties. These rules are so well settled that it will not be necessary to cite the cases. They will be found in 1 *Parsons, Notes and Bills*, 506, *et seq.*; *Story, Promissory Notes*, §§ 319, *et seq.*

The holder, however, will have the advantage of every notice duly sent by a prior party whose liability he has fixed by notice. See note to *Chanoine v. Fowler*, *ante*, p. 383.

There has been some doubt concerning the proper interpretation of the term "one day," used by some of the text-writers, whether it means that the party giving notice has twenty-four hours within which to do so, or whether the expression means that he shall only have until a seasonable mail of the next day. The subject is learnedly discussed by Mr. Justice *Bartley*, in *Lawson v. Farmers' Bank*, 1 *Ohio State*, 206, 212. He said:—

"Touching the second question, then, did the Court of Common Pleas err in charging the jury that, if the notice to the indorsers of the demand and non-payment of the bill was deposited in the post-office at Pittsburgh *at any time during the day after the day of dishonor*, without regard to the time of the

departure of the mail for that day, it would be sufficient notice ; and, moreover, that if it was found inconvenient to deposit the notice in the post-office in time for the mail of that day, it was in proper time if the notice was deposited in time to be sent off by the next mail of the day next after the day following the day of the dishonor of the bill ?

This involves a very important question of the law merchant, and it is not a little surprising that there should remain any doubt or uncertainty at this late day, upon a question of such vital importance to the interest of commercial countries, respecting the duties and liabilities of holders and parties to dishonored paper. And it is a matter of no small moment, that a question which enters so largely as does this into the every-day business transactions of different commercial states and countries should be settled, not only upon a certain and unvarying, but also upon a uniform basis.

The liability of the indorser is strictly conditional, dependent both upon due demand of payment upon the maker or acceptor, and also due and legal notice of the non-payment. The purpose and object of such demand and notice is to enable the indorser to look to his own interest, and take immediate measures for his indemnity. The demand and notice being conditions precedent to the indorser's liability, it is incumbent on the holder to make clear and satisfactory proof of them before he can recover. The plaintiffs in error in this case, being accommodation indorsers, may well insist upon strict proof of due diligence in giving notice of the dishonor of the bill.

The law does not require the utmost diligence in the holder, in giving notice to the dishonor of a bill or note. All that is requisite is ordinary or reasonable diligence. And this is not only the rule and requirement of the law merchant, but a statutory provision of this State. But what amounts to due diligence or reasonable notice is, when the facts are ascertained, purely a question of law, settled "with a view to practical convenience, and the usual course of business."

The question was at one time strenuously contested, whether due diligence did not require that where the parties reside in the same place, the notice of non-payment should be given on the day of the dishonor of the bill ; and where the parties reside in different places, should be sent by the mail of that day, or the first possible or practicable mail after the default. *Tindal v. Brown*, 1 T. R. 167 ; *Darbishire v. Parker*, 6 East, 3 ; *Marius, Bills*, 24. But the rule was established and is supported by great weight of authority, that, where the parties reside in different places, and the post is the mode of conveyance adopted, — although it was in no case necessary to send the notice by the post of the same day of the dishonor, or of the knowledge of the dishonor, the holder being entitled to the whole of that day, being the day of the dishonor, or knowledge of the dishonor, to prepare his notice, — yet that the notice would be insufficient unless put into the post-office in time to go by the next mail after that day. And this is in conformity with the rule laid down by Mr. Chitty in his learned treatise on Bills of Exchange, in the following explicit language : "When the parties do not reside in the same place, and the notice is to be sent by general post, then the holder or party to give the notice, must take care to forward notice by the post of the next day after the dishonor, or after he receives notice of such dishonor, whether that post sets off from the place where he is early or late : and if there be no post on such next day, then he must send off notice by the very next post that occurs after that day." *Chitty, Bills*, 485.



This is in accordance with the rule as settled by the Supreme Court of the United States. In *Lenox v. Roberts*, 2 Wheat. 373, Chief Justice *Marshall* says: "It is the opinion of the Court that notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the day succeeding the last day of grace." And in the case of the *Bank of Alexandria v. Swann*, 9 Peters, 33 [the principal case], Mr. Justice *Thompson* approved of the general rule laid down in the case of *Lenox v. Roberts*, holding that notice of the dishonor need not be forwarded on the last day of grace, but should be sent by the mail of the next day after the dishonor. The same rule was adopted by Mr. Justice *Washington* in the case of the *United States v. Parker's Administrators*, 4 Wash. 465; and in which case subsequently that decision was affirmed on error by the Supreme Court, 12 Wheat. 559. The same rule received the sanction of Mr. Justice *Story*, in the case of the *Seventh Ward Bank v. Hanrick*, 2 Story, 416, although, in the case of *Mitchell v. Degrand*, 1 Mason, 180, he appears to have been disposed to even greater strictness, holding that when a bill is once dishonored, the holder is bound to give notice by the next practicable mail, to the parties whom he means to charge for the default. This, however, is explained by Mr. Justice *Washington* in the case of *United States v. Parker's Administrators*, to mean that the notice should be put into the office in time to be sent by the mail of the succeeding day. This rule, adopted by the Supreme Court of the United States, and which is supported by the great weight of authority in England and in the several States of the Union in which the question appears to have been settled by reported adjudications, is subject to some qualification relaxing its rigor. If two mails leave the same day on the route to the place of the residence of the indorser, it is sufficient to deposit the notice in the post-office in time to go by either mail of that day, inasmuch as the fractions of the day are not counted. *Whitewell v. Johnson*, 17 Mass. 449, 454; *Howard v. Ives*, 1 Hill, N. Y. 263.

And for the reason that the mail of the day succeeding the day of the default may go out in some places soon after midnight or at a very early hour in the morning, and is sometimes made up and closed the evening preceding, it has been adjudged that, inasmuch as the holder is allowed till the day after the day of default to send off the notice, reasonable diligence would not require him to deposit the notice in the post-office at an unseasonably early hour, or before a reasonable time can be had for depositing the notice in the post-office after early business hours of that day. The rule, as qualified and settled by the late authorities, and which I take to be the correct one, is that where the parties reside in the same place or city, the notice *may* be given on the day of default; but if given at any time before the expiration of the day thereafter, it will be sufficient; and when the parties reside in different places or States, the notice *may* be sent by the mail of the day of the default; but if not, it *must* be deposited in the office in time for the mail of the next day, provided the mail of that day be not made up and closed at an unreasonably early hour. If, however, the mail of that day be closed before a reasonable time after early business hours, or if there be no mail sent out on that day, then it must be deposited in time for the next possible post. In the case of *Downs v. The Planters' Bank*, 1 Sm. & M. 261, and also the case of *Chick v. Pillsbury*, 24 Me. 458, the doctrine on this subject has been more fully examined than perhaps in any of the older cases; and the rule adopted is that the notice, in order to charge the indorser living in another

place or State, *must* be deposited in the post-office in time to be sent by the mail of the day succeeding the day of the dishonor, providing the mail of that day be not closed at an unreasonably early hour, or before early and convenient business hours. And this rule is well sustained by authority. *Fullerton et al. v. The Bank of the United States*, 1 Peters, 605, 618; *Eagle Bank v. Chapin*, 3 Pick. 180, 183; *Talbot v. Clark*, 8 Pick. 51; *Carter v. Burley*, 9 N. Hamp. 559, 570; *Farmers' Bank of Maryland v. Duvall*, 7 Gill & Johnson, 79; *Freemans' Bank v. Perkins*, 18 Me. 292; *Mead v. Engs*, 5 Cowen, 303; *Sewall v. Russell*, 3 Wend. 276; *Brown v. Ferguson*, 4 Leigh, 37; *Dodge v. Bank of Kentucky*, 2 Marshall, 610; *Hickman v. Ryan*, 5 Littell, 24; *Hartford Bank v. Steedman*, 3 Conn. 489; *Brenzer v. Wightman*, 7 Watts & S. 264; *Townesley v. Springer*, 1 La. 122; *Bank of Natchez v. King*, 3 Robinson, 243; *Brown v. Turner*, 1 Ala. 752; *Lockwood v. Crawford*, 18 Conn. 361, 363; *Bayley, Bills*, 262; *Story, Promissory Notes*, § 325; and *Byles, Bills*, 160.

Some obscurity and uncertainty have been created on this subject, by the expression used in some of the cases, and by some of the elementary writers, that the holder or person giving the notice, has "one day" or "an entire day" in which to give the notice after the day of the dishonor. The term one day or an entire day, seems not to have been used always in the same sense; and the confusion appears to have in part arisen from the fact, that where the parties reside in the same place, notice at any time before the expiration of the day after the day of the default, will be sufficient, while where the parties reside in different places, the notice must frequently be mailed early in the day, to be in time for the mail of that day.

The defendant in error relies upon the doctrine laid down in the elementary works of Chancellor *Kent* and Mr. Justice *Story*, as fully sustaining the charge of the Court below. Inasmuch as precision and certainty, in the settlement of this rule, are of very great importance, a careful examination of the subject seems to be required.

Chancellor *Kent*, whose accuracy in his *Commentaries on American Law*, is never to be questioned without grave consideration, in the late editions of his works, 3 *Kent's Com.* 106, states the rule as follows:—

"According to the modern doctrine, the notice must be given by the first direct and regular conveyance. This means the first mail that goes after the day next to the third day of grace so that, if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may indeed be sent on Thursday, but must be put into the post-office, or mailed on Friday, so as to be forwarded as soon as possible thereafter."

And in a note by the learned author explanatory of the text, it is said, that,—

"The principle that ordinary reasonable diligence is sufficient, and that the law does not regard the fractions of the day in sending notice, will sustain the rule as it is now generally and best understood in England and in the commercial part of the United States, that notice put into the post-office on the next day at any time of the day, so as to be ready for the first mail that goes thereafter, is due notice, though it may not be mailed in season to go by the mail of the day next after the day of the default."

Several cases are cited by the learned author, but they do not sustain his position. The case of *Jackson v. Richards*, 2 *Caines Cases*, 313, referred to, is

not in point; *Haynes v. Birks*, 3 Bos. & Pul. 599, decides that when the note fell due on Saturday, the notice sent by the post on Monday, was sufficient. Sunday being excluded and not taken into the account, the notice was sent by the post of the next legal day. In the cases of *Bray v. Hadwen*, 5 Maule & Sel. 68, and *Wright v. Shawcross*, 2 Barn. & Ald. 501, it was decided that the notice having arrived on Sunday, was to be considered as having been received on Monday, and then the party had till Tuesday, the next post day for giving the notice. In *Geill v. Jeremy*, 1 M. & M. 61, where no mail went out on the day next after the day of the default, it was held that the rule being an impossible one on that day, a notice sent by the next succeeding mail day would be in season. The case of *Firth v. Thrush*, 8 Barn. & C. 387, turned upon the question whether the attorney employed to ascertain the residence of the defendant, should be allowed a day to consult his client after information of the defendant's residence. And Lord *Tenterden* said, "if the letter (giving information of the defendant's residence) had been sent to the principal, he would have been bound to give notice on the next day." The only other case referred to, is that of *Hawkes v. Salter*, 4 Bing. 715; and this is the only one which even tends to sustain the position of the learned author. In that case the bill was dishonored on Saturday, and the mail left at half-past nine o'clock on Monday morning; and an unsuccessful attempt was made to prove that the notice was put into the post-office on Tuesday morning. *Best*, C. J., expressed himself clearly of opinion, "that it would have been sufficient if the letter had been put into the post-office before the mail started on the Tuesday morning, but that there was no sufficient evidence that it had been put in even on Tuesday morning." The opinion in this case was, therefore, a mere *dictum*, which determined nothing, the case being decided upon a different ground.

But the position of Chancellor *Kent*, above referred to, is in direct conflict with the rule as laid down by himself in the first edition of his work. In the edition of 1828, 3 *Kent's Com.* 73, the rule is stated in these words:—

"According to the modern doctrine the notice must be given by the first direct regular conveyance. This means the first convenient and practicable mail that goes on the day next to the third day of grace; so that if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may indeed be sent on Thursday, but must be sent by the mail that goes on Friday."

In the last edition of this work, published in 1851, the editor, Mr. William Kent, admits the weight of authority to be in favor of the rule as laid down in *Chick v. Pillsbury* and *Downs v. Planters' Bank* above referred to; and he says, that,—

"The opinion of C. J. *Best*, in 4 Bing. 715, is the only one that sustains the rule suggested, and that the observations of Mr. Justice *Story* were too latitudinarian in allowing the entire whole day next after the dishonor."

It is true, that Mr. Justice *Story* in his work on Bills of Exchange, § 291, says that an indorser need not give notice to his antecedent indorser, till twenty-four hours have elapsed after the receipt of his own notice of the dishonor. And in his note to § 290, of the same work, the author says, that,—

"The rule does not appear to be so strict as it is laid down by Mr. Chitty, and that it would be more correct to say, that the holder is entitled to one whole day to prepare his notice, and that, therefore, it will be sufficient, if he sends

it by the next post that goes after twenty-four hours from the time of the dishonor," &c.

And he adds, —

"I have seen no late case which imports a different doctrine; on the contrary, they appear to me to sustain it; but as I do not know of any direct authority which positively so decides, this remark is merely propounded for the consideration of the learned reader."

It is not necessary here to inquire whether the position taken by the learned author is in conflict with the decisions made by himself in 1 Mason, 180, and 2 Story, 416, above referred to. In his same work on Bills of Exchange, he has stated the rule with great precision and accuracy in the following language, in § 382 : —

"In all cases where notice is required to be given, it is sufficient, if the notice is personal, that it is given on the day succeeding the day of the dishonor, early enough for the party to receive it on that day. If sent by the mail, it is sufficient if it is sent by the mail of the next day, or the next practicable mail." And in § 288: "If the post or mail leaves the next day after the dishonor, the notice should be sent by that post or mail, if the time of its closing or departure, is not at too early an hour to disable the holder from a reasonable performance of the duty. So that the rule may be fairly stated in more general terms to be, that the notice is in all cases to be sent by the next practical post or mail after the day of the dishonor, having a due reference to all the circumstances of the case."

The same learned author has laid down the rule very fully to the same effect in his work on Promissory Notes, § 324.

The statement of the rule in the last extract, is consistent with the doctrine established by the Supreme Court of the United States, and fully sustained by authority.

The discrepancies which have arisen on this subject appear to have grown out of an inaccurate use in some of the books and decisions of the terms "his day," "an entire day," and "a whole day," &c., these phrases being at one time understood or taken literally, and at another time to mean a space of time equal to a full day. If these phrases are to be taken to mean the duration of a full day instead of the day itself, in their general application, the effect would be to change and break down numerous well-settled and useful rules. The law as a general thing does not have regard to the fractions of a day, and thus compel parties to resort to nice questions of the sufficiency of a certain number of hours or minutes, and to the taking of the parts of two different days to make up what may be considered in one sense a day, because equal in duration to one entire day. If this were the case the indorser, after having been notified, would often be unable to determine whether he had been notified in season or not, until he had learned the hour of the day when the default occurred; and the holder would have it in his power at times of affecting injuriously the right of the indorser to an early notice, by delaying the presentment until a late hour in the day. Nothing more could have been intended by the use of these phrases than that each party should have a specified day upon which the act enjoined upon him should be performed. This is the sense in which Lord *Ellenborough* used it in the case of *Smith v. Mullett*, 2 Camp. 208, when he said: "If a party has an entire day,

he must send off his letter conveying the notice within post time of that day." And it is said by a learned elementary author, "if a party has an entire day, he must send off his letter conveying the notice of the dishonor of the bill within post time of that day." Byles, Bills, 161.

The rule laid down in Smith's Mercantile Law, to which the defendant in error has referred, will not, as I apprehend, be found on close examination to be at variance with the doctrine here adopted. Smith's Mercantile Law, 310.

It is claimed on behalf of the plaintiffs in error in this case, that the notice of the dishonor of the bill should have been sent immediately to them, instead of being sent, as it was in the first place, to the Bank of Salem. The holder is not bound to give notice of the dishonor to any more than his immediate indorser; and each party to a bill has the same time after notice to himself for giving notice to other parties beyond him, that was allowed to the holder after the default. *Sheldon v. Benham*, 4 Hill, N. Y. 129; *Eagle Bank v. Hathaway*, 5 Met. 213. And when a bill is sent to an agent for collection, the agent is required simply to give notice of the dishonor in due time to his principal; and the principal then has the same time for giving notice to the indorsers after such notice from his agent, as if he had been himself an indorser receiving notice from a holder. *Bank of the United States v. Davis*, 2 Hill, N. Y. 452; *Church v. Barlow*, 9 Pick. 547. The party in this case, therefore, was not at fault by sending the notice directly to the Bank of Salem, leaving that bank to send the notice to the plaintiffs in error.

Applying the rule, therefore, which we have adopted as the correct one, to this case, it was incumbent on the plaintiff below, in order to be entitled to a recovery, to show that the notice of the dishonor of the bill was deposited in the post-office in Pittsburgh, in time to be sent by the mail of the twenty-eighth day of July. Ten minutes past nine o'clock in the morning was not an unreasonably early hour, or before a reasonable and convenient time after the commencement of early business hours of the day. The neglect, therefore, to send the notice by the mail of the next day after the day of the default, operated to discharge the plaintiffs in error as indorsers, unless from some other cause notice had been dispensed with or rendered unnecessary. And for the charge of the Court of Common Pleas to the jury to the contrary, the judgment is reversed, and the cause remanded for further proceedings."

See *Stephenson v. Dickson*, 24 Penn. State, 148; *Prideaux v. Criddle*, Law Rep. 4 Q. B. 455; also *Simpson v. Turney*, *ante*, p. 386.

If notice is sent by private conveyance, the holder's responsibility continues until delivery; and this must not be later than the day on which it would have arrived if sent by mail. *Van Vechten v. Prayn*, 13 N. Y. (3 Kern.) 549, 555. See *post*, p. 410.

FREDERICK W. WALKER v. CHARLES STETSON.

(14 Ohio State, 89. Supreme Court, December, 1862.)

Domicile. Where notice should be sent.—The fact that a drawer or indorser goes from the place of his actual residence to another place to dispose of property, which occupies him for several weeks of time, does not make such town his place of business within the meaning of the rule upon the subject of notice, in the absence of all explanation as to the mode of doing the business, or of his relations to the post-office there.

THE case is stated in the opinion of the Court.

RANNEY, J. The bills of exchange upon which this action was brought, were drawn and indorsed by the plaintiff in error. His liability upon them was conditional, and his obligation to pay them depended upon their being duly dishonored, and legal notice of such dishonor; unless, indeed, he had waived such diligence on the part of the holder. The bills were legally dishonored and properly protested, and notices for all the parties conditionally liable were in due time forwarded to the defendant in error, a subsequent indorser of the bills. The right to recover was placed upon two grounds: 1. That the defendant in error had, on the day he received these notices, forwarded by mail, those directed to the plaintiff in error, to his place of business at Chicago; and, 2. That a few days thereafter, in a personal interview with the defendant in error, he had recognized his liability as still existing, and had expressly promised to pay the bills. The verdict of the jury may have been founded upon the ground last stated, but, as there was a conflict in the evidence upon it, there is nothing in the record to show that it was; and we are, consequently, compelled to examine the facts applicable to the first ground, and the instructions of the Court based upon that state of facts.

Stating these facts as broadly as any thing in the evidence will warrant, they amounted to this: The plaintiff in error was a resident of Morristown, New Jersey, and had no fixed residence in the State of Ohio, or at Chicago; but during most of the season of 1856 had been engaged in the lumber business, staying at Cleveland, and in Ottawa county, where he owned a saw-mill. That

about the first of November he left Cleveland, and, before doing so, informed the defendant in error that he was going to Chicago to dispose of a quantity of lumber which he was about shipping to that place, and should return from there to Cleveland; and had not returned when the notices were mailed to him at Chicago on the 22d of that month,—that being the very day upon which they were received by the defendant in error from the notary in New York. In point of fact, the plaintiff in error was in Chicago when the notices were mailed to him, but probably left there before they arrived, and shortly after was in Cleveland, where he was met by the defendant in error, and fully informed of all that had transpired.

Upon this state of the facts, counsel for the plaintiff in error requested the Court to charge the jury, “That if the defendant’s residence was not in Chicago, or he was not engaged in any permanent business there, but was there temporarily, and for a temporary purpose only, the sending to him, at Chicago, notices of the protest of said bills of exchange would not be, unless the defendant actually received them, due diligence, and sufficient to charge the defendant with the payment of said bills.”

To which the Court responded as follows: “That if the defendant did not reside in Chicago, and was not engaged in any permanent business there, but was there for a purpose merely temporary, sending notices of protest to him at Chicago would not, as a proposition of law, constitute due diligence sufficient to charge the defendant. But if the defendant had gone to Chicago on business which would detain him an indefinite period of time, and might occupy him there during the remainder of the season of navigation on the lakes, that might be the proper place to send the notices to him; and it was a question of fact for the jury to find, referring to all the testimony on that question, whether the business of the defendant at Chicago was of that character, or whether the plaintiff had sufficient reason from his information derived from the defendant, or from his own knowledge of the defendant’s business, to believe the defendant was at Chicago at the time the notices were sent by him, such notices would be due diligence on the part of the plaintiff, and sufficient to charge the defendant.”

If we were permitted to treat the matter as a question of injury to the plaintiff in error, there would be no difficulty whatever in saying that he lost nothing by the course pursued by the defendant

in error, and probably was actually informed of the dishonor of the bills sooner than he could have been, if the notices had been sent to his residence in New Jersey. But we are not at liberty to take so wide a view of the subject. The law has very definitely settled what shall constitute due diligence in such cases, and when the facts are ascertained, it is the duty of the Court to determine, as a question of law, whether reasonable diligence has been used; and it cannot be submitted to the jury as a question of fact. *Bank of Columbia v. Lawrence*, 1 Peters, 578; ¹ *Bank of Utica v. Bender*, 21 Wend. 643; ² *Carroll v. Upton*, 3 Com. 272; *Wheeler v. Field*, 6 Met. 290; *Belden v. Lamb*, 17 Conn. 442; *Lorain Bank of Elyria v. Townsend*, 2 Ohio State, 343. The object has been to attain the greatest possible certainty in a matter so vital to the interests of the mercantile community, and the equities of particular cases have not been allowed to interfere with the attainment of this object. In this State, these rules have been fully adopted and constantly enforced, and if we saw reason now to doubt their justice or policy, we should find ourselves unable to change them, without a corresponding change should take place in States and countries with which our commercial relations are so extensive and important.

The parties in this case not residing in the same place, there is no doubt that it was a proper case for sending the notices by mail, and in such cases it is well settled, that putting into the post-office seasonably a notice properly directed is, in itself, due diligence, or constructive notice, and will be sufficient, although it never reaches the party to whom it is directed. *Woodecock v. Houldsworth*, 16 Mees. & W. 124; *Dickens v. Beal*, 10 Peters, 570; *Jones v. Lewis*, 8 Watts & S. 14. As to the place to which the notice should be directed, it is equally well settled, that it should be sent to the drawer or indorser's residence or place of business, if either is known to the holder, or, upon diligent inquiry, can be ascertained; and if neither are known nor can be found, the law dispenses with any notice whatever. *Bank of the United States v. Carneal*, 2 Peters, 543; *Chitty, Bills*, 486; *Bayley, Bills*, 280. But while this is the general principle, the spirit of the rule certainly is, that the notice should be sent to such place that it will be most likely promptly to reach the person for whom it is intended; and hence, in its application to particular cases, it has often been held that a notice is

¹ *Post*, 404.

² *Post*, 410.

sufficient if sent to the post-office where the party usually receives his letters, although not that of his residence, as well as to that where he resides; and in all cases the notice may be sent to the place pointed out by the drawer or indorser, and in general will be sufficient, both in reference to himself and parties who stand behind him on the bill. *Reid v. Payne*, 16 Johns. 218; *Bank of Geneva v. Howlett*, 4 Wend. 328; *Bank of United States v. Lane*, 3 Hawks, 453; *Shelton v. Braithwaite*, 8 Mees. & W. 252. Indeed, it is suggested in the present case that the statement made by the plaintiff to the defendant in error, sufficiently indicated Chicago as the place to which the notices might be sent. Whatever of weight this suggestion may properly have, it can only be considered by us when the case in the Court below appears to have been decided upon that ground. As yet this consideration has not been passed upon in that Court.

How then, in view of the foregoing principles, stands the case before us? Was Chicago, in the sense of the legal rule, so far the residence or place of business of the party as to make the notices sent there constructive notice of the dishonor of the bills? A very careful examination of all the evidence now contained in the record has fully satisfied us that it was not. Upon this point there is no conflict in the evidence. The plaintiff below says the defendant informed him he was going to Chicago "to dispose of a quantity of lumber, which he was about shipping to that place, and should return from there to Cleveland;" that he knew the defendant had been to Chicago, but did not know that he was there when the notices were mailed, and had reason to believe he did not receive them there, as he was soon afterward back to Cleveland. The defendant says he went to Chicago, and was there from the first to the twenty-fourth of November, "disposing of a quantity of lumber," and in the afternoon of the day last named, he left Chicago, and arrived at Cleveland on the morning of the 26th; that he had no permanent business at Chicago, and was there for a temporary purpose only, and never received the notices sent.

The question is then reduced to this: Does going to a city to dispose of property, which occupies the party for three weeks of time, without one word of explanation as to the mode of doing the business, or his relations to the post-office, make such city his place of business within the meaning of the commercial rule? If we were to affirm that it did, the principle must have a very wide,

and as we think a very disastrous, application to a large class of business men, dealing more largely than any other in commercial paper. The stock and produce of the West are taken to the eastern cities, by persons engaged in that business, to be sold; and most western merchants, once or twice in each year, spend from a few days to a few weeks at the same places, replenishing their stocks of goods. Did anybody ever suppose that these persons were bound to watch the post-offices in those cities for notices of the protest of their paper? We think not; and yet if these notices are sufficient, we see no distinction to be taken between this case and theirs. It is very certain that no decided case has given any countenance to the supposition that such a notice, not received by the party, would be sufficient.

The cases of *Tunstall v. Walker*, 2 Sm. & M. 638, and *Chouteau v. Webster*, 6 Met. 1, have, perhaps, gone to the verge of the law, but they are very far from reaching this case. In each of those cases the defendant was, at the time the notice was forwarded to him at Washington, a senator in Congress, and in actual attendance on that body. The first of these cases had been before decided by the High Court of Errors and Appeals, and is reported in 1 How. Miss. 259. Upon the then state of the evidence, the Court held that a notice sent to Washington city, when the senator had a residence in the State which he represented, would not be sufficient to charge him as an indorser; and the reason assigned is, that "his absence was but temporary, and the duration of that absence uncertain. In case of such absence from home, the law presumes that some member of the family is still at the residence, and that communications will be forwarded to the proper address." But, upon a further trial of the case, it was proved that the defendant had no actual residence in Mississippi, and had left no agent at his last place of abode to receive or forward his letters; that from the fourth of February, when the notice was forwarded, to the fourth of March ensuing, he was in the actual discharge of his official duties at Washington, and in the daily habit of receiving his letters at the post-office in that city; and, upon this state of facts, the Court held the notice sent to that city sufficient. In the case of *Chouteau v. Webster*, the defendant had left an agent in Boston in charge of his business, but this was unknown to the holder of the paper; and upon an agreed statement of the facts showing that the notice was, in due time, deposited in the post-office directed to the de-

fendant at Washington, where he was then, and for some time afterward, in attendance upon a session of Congress; and that all letters addressed to members were regularly and immediately taken from the post-office by officers of the Senate, and delivered to such members, the Court held the notice sufficient. *C. J. Shaw*, after premising the caution that the "decision is founded on the circumstances of the particular case, and may be varied by other facts," proceeds to place it upon the ground that, while the defendant's domicile was at Boston, his "actual residence" was at Washington, "to which, for the time being, he was fixed by his public duty." We have no doubt of the correctness of these decisions; and no comment can be necessary to distinguish them from a case where the party simply visits a place for a purpose clearly temporary and special, with no proof to show that he has identified himself with its business, or establish any relations with its post-office. Regarding that as this case, we are clearly of the opinion that the plaintiff in error was entitled to the instruction he asked, and that the learned judge erred in the qualifications he annexed to the instruction given.

If we were entirely satisfied of the correctness of this qualification in the abstract, we should still be compelled to reverse the judgment, for the reason that there was no evidence to give any wider scope to the inquiry than that contemplated in the instruction asked for. That this was an error has been settled by this Court, and the value of jury trial will very much depend upon the observance of the principle. In *Bain v. Wilson*, 10 Ohio State, 16, the instruction asked and given, as well as the qualification annexed by the Court, were all held to be a correct exposition of the law; and yet, as "there was no evidence before the jury which required or even authorized the qualification annexed by the Court," the judgment was reversed. The Court say: "The judge must confine himself in his remarks to the law and evidence of the case. So far from being under any obligation to call the attention of the jury to a conjectural state of facts, it would be highly improper for him to do so." And the reason for this is very pertinently stated in one of the cases referred to: "Jurors are constantly inclined to look to the opinion of the judge for instruction as to what is and what is not evidence. When he tells them to determine a given problem from the evidence before them, they can hardly do otherwise than infer that, in his judgment, there is evidence upon

which their verdict, when given, may rest." *Fay v. Grimstead*, 10 Barb. 321.

But we are very far from being satisfied that the qualification annexed in this case does contain a correct statement of the law. After stating that if the plaintiff in error was in Chicago for a purpose merely temporary, the notices would not be sufficient, the Court proceed to say, that if his business there was such as would detain him an indefinite time, and "might occupy him there during the remainder of the season of navigation on the lakes," it might be proper to send the notices to that place. If he went there for the special purpose stated in the evidence, we do not think it would make any difference that he could not tell precisely when he would be able to sell his property; and when it is remembered that this was in the month of November, we do not think that a delay in effecting his object until the navigation should close, would be in any way decisive. At most, it would be but a circumstance, entitled to its just weight with others in determining the question whether Chicago was his place of business, or whether he was a mere sojourner there for a special and limited purpose. In the one case, he might be charged by a notice sent to that post-office, because he is presumed to have established relations with it; in the other, no such presumption arises, and he can be charged only upon the actual receipt of the notice. Indeed, when the whole instruction is taken together, it amounts to little less than a request to the jury to go beyond the uncontradicted and legally insufficient facts in evidence, and inquire into the motives of the plaintiff below; and concluding with the positive instruction that, if he had sufficient reason "to believe the defendant was at Chicago at the time the notices were sent," they would be sufficient to charge him.

Without perhaps intending to do so, it seems to us that the Court has incautiously surrendered its rightful province to judge of the sufficiency of the facts to constitute due diligence, and has devolved that duty upon the jury. To approve of that, would be to abandon all that has been gained in the way of certainty, in the determination of questions of this character.

While it is true that the rules necessary to be observed in charging parties conditionally liable upon negotiable paper are strict, and require much care and promptitude on the part of the holder; yet they are such as long experience has demonstrated to be neces-

sary, and a substantial compliance with them lies at the very foundation of the contract into which the drawer or indorser enters. His contract is conditional, and to make it absolute, without a fair performance of the conditions, would be to make a contract for him, instead of enforcing the one he has made for himself.

The judgment must be reversed, and the cause remanded to the District Court of Cuyahoga county for further proceedings.

At the time a promissory note was made, the maker and indorser both resided in Rochester, at which place the note was dated, and it was discounted at the plaintiffs' bank, which was also located there, and where the plaintiffs resided. It was held that the plaintiffs had the right, when the note matured, to assume that the indorser still resided in Rochester, and to act accordingly in taking the requisite steps to charge him as such, unless they knew that in the mean time he had changed his residence. *Ward v. Perrin*, 54 Barb. 89. See further upon this subject, *Bliss v. Nichols*, 12 Allen, 443; *Berridge v. Fitzgerald*, Law Rep. 4 Q. B. 639; *Bank of Columbia v. Lawrence*, *infra*, and note.

THE BANK OF COLUMBIA, USE OF THE BANK OF THE UNITED STATES, *v.* JOHN LAWRENCE.

(1 Peters, 578. Supreme Court of the United States, January, 1828.)

Where notice should be sent. — Actual notice to an indorser is not required; due diligence only is necessary. Therefore, in the case of an indorser who lived in the country, two or three miles distant from the place (G.) at which the note in question was payable, where he usually received his mail; *held*, that notice left in the post-office at G., directed to him at that place, was sufficient to charge him.

THE case is stated in the opinion of the Court.

THOMPSON, J. This case comes before the Court upon a writ of error to the Circuit Court of the District of Columbia.

The defendant was sued as indorser of a promissory note for \$5000, made by Joseph Mulligan, bearing date the fifteenth of July, 1819, and payable sixty days after date, at the Bank of Columbia. The making and indorsing the note, and the demand of payment, were duly proved; and the only question upon the trial was touching the manner in which notice of non-payment was

given to the indorser ; no objection being made to the sufficiency of the notice in point of time.

The material facts before the Court upon this part of the case, as shown by the bill of exceptions, were : That the banking-house of the plaintiffs was in Georgetown, at which place the note appears to be dated. That some time before the note fell due the defendant had lived in the city of Washington, and carried on the business of a morocco leather-dresser, keeping a shop and living in a house of his own in the said city. That about the year 1818, he sold his shop and stock in trade and relinquished his business, and removed with his family to a farm, in Alexandria county, within the District of Columbia, and about two or three miles from Georgetown. That the Georgetown post-office was the nearest post-office to his place of residence, and the one at which he usually received his letters.

The notice of non-payment was put into the post-office at Georgetown, addressed to the defendant at that place. It was proved on the part of the defendant, that at the time of his removal into the country, and from that time until after the note in question fell due, he continued to be the owner of the house in Washington, where he formerly lived, and which was occupied by his sister-in-law, Mrs. Harbaugh. That he came frequently and regularly every week, and as often as two or three times a week, to this house ; where he was employed in winding up his former business and settling his accounts, and where he kept his books of account, and where his bank notices, such as were usually served by the runner of the bank on parties who were to pay notes, were sometimes left, and sometimes at a shop opposite to his house ; and where also his newspapers and foreign letters were left. That his coming to town and so employing himself was generally known to persons having business with him. That his residence in the country was known to the cashier of the bank. That there was a regular daily mail from Georgetown to the city of Washington, and that the defendant's house was situated in Washington less than a quarter of a mile from Georgetown.

There was also some evidence given on the part of the plaintiffs tending to show that the usage of the bank in serving notices in similar cases, was conformably to the one here pursued, and that the defendant was apprised of such usage. But that the testimony may be laid out of view, as this Court does not found its

opinion in any measure upon that part of the case. Upon this evidence the plaintiffs prayed the Court to instruct the jury, that it was not incumbent on them to have left the notice of the non-payment of the note at the house occupied by Mrs. Harbaugh, as stated in the evidence; but that it was sufficient, under the circumstances stated, to leave the notice at the post-office in Georgetown; which instructions the Court refused to give, but instructed the jury that their verdict must be governed according to their opinion and finding on the subject of usage which had been given in evidence.

The jury found a verdict for the defendant.

From this statement of the case it appears that the note was made at Georgetown, payable at the Bank of Columbia in that town. That the defendant, when he indorsed the note, lived in the county of Alexandria, within the District of Columbia, and having what is alleged to have been a place of business in the city of Washington; and the notice of non-payment was put into the Georgetown post-office, addressed to the defendant at that place, by which it is understood that the notice was either inclosed in a letter, or the notice itself sealed and superscribed with the name of the defendant, with the direction "Georgetown" upon it; and whether this notice is sufficient is the question to be decided.

If it should be admitted that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good, it by no means follows that service at his place of residence in a different place, would not be equally good. Parties may be and frequently are so situated that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there two or three times a week in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case, the inquiry is narrowed down to the single point, whether notice through the post-office at Georgetown was good; the defendant residing in the country two or three miles distant from that place in the county of Alexandria.

The general rule is, that the party whose duty it is to give notice in such cases is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary mode of conveyance, and, whether the notice reaches the party or not, the holder has done all that the law requires of him.

It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed on uniform rules on the subject, and is highly important for the safety of holders of commercial paper.

And these rules ought to be reasonable and founded in general convenience, and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice, has in the same city or town a dwelling-house and counting-house or place of business within the compact part of such city or town, a notice delivered at either place is sufficient; and if his dwelling and place of business be within the district of a letter-carrier, a letter containing such notice, addressed to the party and left at the post-office would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming that the notice will be brought home to the party without unreasonable delay. So when the holder and indorser live in different post-towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this for the same reason, that the mail being a usual channel of communication, notice sent by it is evidence of due diligence. And for the sake of general convenience it has been found necessary to enlarge this rule. And it is accordingly held, that when the party to be affected by the notice resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the post-office within which the party must reside, in order to make this a good service of the notice. Nor would we be understood as laying it down as a universal rule, that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was

in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore evidence of due diligence.

In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone, or the usual course of receiving letters, which must determine sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, cannot affect the question. It was in proof that the post-office in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And as the letter was there to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one.

No cases have fallen under the notice of the Court which have suggested any limits to the distance from the post-office within which a party must reside in order to make the service of the notice in this manner good. Cases, however, have occurred, where the distance was much greater than in the one now before the Court, and the notice held sufficient. 16 Johns. 218. In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say no such cases can arise, but they will seldom if ever occur, and, at all events, such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases, by allowing the holder to recover of the indorser the expense of serving notice by a special messenger. The case of *Pearson v. Crallan*, 2 Smith, 404; *Chitty*, 222, *n.*, is one of this description. But in that case, the Court did not say that it was necessary to send a special messenger; and it was left to the jury to decide whether it was done wantonly or not. The

holder is not bound to use the mail for the purpose of sending notice. He may employ a special messenger if he pleases, but no case has been found where the English courts have directly decided that he must. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper on the party bound to pay, is at least very questionable.

We are accordingly of opinion that the notice of non-payment was duly served upon the defendant, and that the Court erred in refusing so to instruct the jury.

Judgment reversed, and *venire facias de novo* awarded.

Many of the rules relating to this subject are common to the subject of presentment, to which the reader is referred. There is one material distinction, however, which is worthy of note; that is, that, though presentment should be made only at the residence or place of business of the maker or acceptor, personal notice to a drawer or indorser, in due time, is good wherever given. *Hyslop v. Jones*, 3 McLean, 96.

If there are two post-offices in the same town, notice in a letter directed to the indorser generally at the town or to either of the offices, will be good, unless the party sending notice knew, or might by inquiry have learned, which was the proper office. Upon this subject *Shaw, C. J.*, in *Morton v. Westcott*, 8 Cush. 425, said: "It seems well settled that where there are two post-offices in a town, notice by letter to an indorser addressed to him at the town generally is sufficient, unless the party addressed has been generally accustomed to receive his letters at one of the offices in particular, and to have his letters addressed to him there by his correspondents. Such being the rule, the plaintiff proves his case *prima facie* by proving notice by letters addressed to the defendant at the town generally. If then the defendant would rebut this presumption of fact, and bring himself within the exception, it lies on him to prove that he did usually receive his letters at one office only, and that this might have been known by reasonable inquiry at the place where the letter was mailed. Without this proof it may be true that the defendant received his letters habitually as well at one post-office as the other, and then the plaintiff's *prima facie* proof remains un rebutted, and he must prevail." See *Downer v. Remer*, 21 Wend. 10, to the same effect. See also *Shaylor v. Mix*, 4 Allen, 351, cited at length, *post*, 413; *Woods v. Neeld*, 44 Penn. State, 86.

If the party to be notified lives in a town in which there is no post-office, it seems that notice by letter sent to the nearest post-office will be sufficient. *Shed v. Brett*, 1 Pick. 401, 411; *Ireland v. Kip*, 11 Johns. 232; *Union Bank v. Stoker*, 1 La. An. 269. And it is held that where the nearest post-office is unknown, if diligent inquiry is made to ascertain the fact, and notice is sent accordingly, that is sufficient. *Marsh v. Barr*, Meigs, 68; s. c., 9 Yerg. 253. See *Moore v. Hardecastle*, 11 Md. 486; *Davis v. Beckham*, 4 Humph. 53; *Davis v. Williams*, Peck, 191; *Bank of United States v. Carneal*, 2 Peters, 543, 551. See also *Woods v. Neeld*, 44 Penn. State, 86.

Where the drawer or indorser receives his mail at either one of several post-offices, notice may be sent to either. *Bank of United States v. Carneal*, 2 Peters, 543; *Bank of Louisiana v. Tournillon*, 12 La. An. 132. See also *Bank of Geneva v. Howlett*, 4 Wend. 328; *Chouteau v. Webster*, 6 Met. 1; *Bank of Columbia v. Magruder*, 6 Harris & J. 172; *Seneca Co. Bank v. Neass*, 5 Denio, 329, 338; *Ransom v. Mack*, 2 Hill, 587; *Mercer v. Lancaster*, 5 Penn. State, 160.

As to the employment of messengers discussed in the principal case, the following points are settled: If the holder elect to send notice by private conveyance instead of by mail, his responsibility continues until delivery of the notice, either personally to the party to be charged, or at his place of business or residence. *Van Vechten v. Pruyn*, 13 N. Y. (3 Kern.) 549, 555. In this case if it reach its destination on the same day, within business hours, on which it would have arrived by mail, it is in time; but if it does not reach the place until the next day, it is too late. *Bancroft v. Hall*, Holt, N. P. 476; *Beeching v. Gower*, id. 315, note; *Darbishire v. Parker*, 6 East, 3. See *Jarvis v. St. Croix Manuf. Co.*, 23 Maine, 287.

BANK OF UTICA v. BENDER.

(21 Wendell, 643. Supreme Court of New York, October, 1839.)

Diligence. Law and fact.—When the facts are all found, what is reasonable diligence is a question of law.

Reasonable diligence, not excessive, required.—The holder of a bill inquired of the drawer, upon discounting the same, where the defendant, an accommodation indorser of the drawer, resided. Notice was sent according to the answer given. *Held*, that this was reasonable diligence, nothing having occurred to lead the holder to distrust the information received, though the indorser actually lived in a different place from that named, and received his mail in a third.

THE case is sufficiently stated in the head-note and in the opinion of the Court.

BRONSON, J. When the facts are all ascertained, what is reasonable diligence is a question of law. "This results," said *Spencer*, J., in *Bryden v. Bryden*, 11 Johns. 187, "from the necessity of having some fixed legal standard, by which men may not only know the law, but be protected by it." Bayley, Bills, 142, 144, and notes. The judge was not requested to submit the question of due diligence to the jury; but had it been otherwise, he was right in treating it as a question of law, there being no dispute about the facts.

Was there reasonable diligence in endeavoring to ascertain the place to which the notice should be directed? Not knowing where the defendant lived, the plaintiffs inquired of the drawer, for whose accommodation the bill was discounted, and relying upon the information given by him, they sent the notice to Chittenango, when it should have been sent to Manlius or Hartsville. This is not like the case of the Catskill Bank v. Stall, 15 Wend. 364, affirmed in error, 18 id. 466: for there the person who took the note to the bank, and gave the information on which the notice was misdirected, was the agent of the indorsers, and they had no right to complain that credit had been given to what was, in effect, their own representation.

But I am unable to distinguish this from the case of the Bank of Utica v. Davidson, 5 Wend. 587. That was an action against the indorser of a note which had been discounted for the accommodation of the maker, and the notice of protest was sent to Bainbridge, when it should have been sent to Masonville, where the indorser lived. The person who took the note to the bank, and gave the information on which the plaintiffs acted, was the agent of the maker, and it was held that there had been due diligence, and judgment was rendered for the plaintiffs. *Sutherland, J.*, mentions the fact that the note was dated at Bainbridge, where the notice was sent, and that the indorser had but recently removed from that place; but the case was put mainly on the ground, that the plaintiffs had a right to rely on the information given by the agent of the maker when the note was discounted. In the case at bar, notice was directed to the place where the bill purports to have been drawn; and the only difference between this and the case of the Bank of Utica v. Davidson, consists in the single fact, that the indorser of this bill had never lived at Chittenango. That does not, I think, furnish sufficient ground for a solid distinction between the two cases.

How does the question stand upon principle? It is not absolutely necessary that notice should be brought home to the indorser, nor even that it should be directed to the place of his residence. It is enough that the holder of a bill make diligent inquiry for the indorser, and acts upon the best information he is able to procure. If after doing so, the notice fail to reach the indorser, the misfortune falls on him, not on the holder. There must be ordinary or reasonable diligence, — such as men of business usually exercise

when their interest depends upon obtaining correct information. The holder must act in good faith, and not give credit to doubtful intelligence when better could have been obtained.

Now, what was done in this case? The plaintiffs inquired of Cobb, the drawer of the bill, who would of course be likely to know where his accommodation indorser lived. They saw that the defendant, by lending his name, had evinced his confidence in the integrity of the drawer; and so far as appears, nothing had then occurred which should have led the plaintiffs, or any prudent man, to distrust the accuracy of Cobb's statements concerning any matter of fact within his knowledge. He professed to be able to give the desired information, and his answer was unequivocal. If Cobb was worthy of being believed, there was no reason for doubt that the indorser resided at Chittenango. The plaintiffs confided in this information, and acted upon it.

But it is said that Cobb had an interest in giving false information for the purpose of protecting his accommodation indorser, and consequently that the plaintiffs should not have trusted to his statement. He certainly had no legal interest in the question. If the bill was not accepted and paid by the drawee, Cobb, as the drawer, was bound to pay and take it up from the holder; and if the indorser was charged, Cobb was bound to see him indemnified. In a legal point of view, it was wholly a matter of indifference to him whether notice of the dishonor of the bill should be brought home to the indorser or not. Before any thing can be made out of the objection, we must say that the plaintiffs were bound to suspect that Cobb, when he presented the bill, intended to commit a fraud; that he was obtaining a discount upon a draft which he knew would not be paid, either by the drawee or by himself; that the money was to be lost to some one, and that he preferred the loss should fall on the holder rather than the indorser; and consequently, that he would give false information concerning the proper place for directing notice. It is quite evident that the plaintiffs entertained no such suspicion; for if they had, they would neither have confided in the statements of Cobb, nor would they have loaned him the money. I think they were not bound to believe that a fraud was intended. There was nothing in the circumstances of the case calculated to induce such a belief in the mind of any man of ordinary prudence and foresight. This was an every-day business transaction, where men must of necessity repose a

reasonable degree of confidence in each other, and no one can be chargeable with a want of diligence for trusting to information which would usually be deemed satisfactory among business men. If there was any ground whatever for suspecting fraud on the part of Cobb, it was, to say the least, very slight, and was fully counter-balanced by the fact that the defendant had testified his confidence in Cobb by lending his name as indorser. The plaintiffs have, I think, lost nothing by trusting to information derived from the drawer of the bill, instead of seeking it from some other individual.

The case then comes to this. The plaintiffs applied for information to a man worthy of belief, and who was likely to know where the indorser lived. They received such an answer as left no reasonable ground for doubt that Chittenango was the place to which the notice should be sent. I think they were not bound to push the inquiry further. Men of business usually act upon such information. They buy and sell, and do other things affecting their interest, upon the credit which they give to the declarations of a single individual concerning a particular fact of this kind within his knowledge. This is matter of common experience. Ordinary diligence in a case like this can mean no more than that the inquiry shall be pursued until it is satisfactorily answered. This is the only practical rule. If the holder of a bill is required to go further, it is impossible to say where he can safely stop. Would it be enough to inquire of two, three, or four individuals, or must he seek intelligence from every man in the place likely to know any thing about the matter? It would be difficult, if not impossible, to answer this question. *New trial denied.*

So where the holder of a bill inquired of a person trading at a particular place if he knew where an indorser resided, and he replied that he resided at the place where he traded, and it did not appear that the holder had any better means of knowledge, it was held that he had used due diligence to learn the residence of the indorser, and that notice put into the post-office directed to him there was sufficient. *Lambert v. Ghiselin*, 9 How. 552.

It was further held in this case that after due diligence had been used and notice sent accordingly, the holder is not obliged to give any further notice, though he afterwards discover that the notice was directed to the wrong place. But *Beale v. Parrish*, 20 N. Y. (6 Smith) 407, holds a contrary view: without noticing *Lambert v. Ghiselin*, however. And the doctrine of *Beale v. Parrish* is not stated with perfect confidence. See latter portion of the opinion by Mr. Justice Grover.

That due diligence is a question of law when the facts are ascertained, is well settled. See *Walker v. Stetson*, *ante*, pp. 397, 399, and cases cited.

EXCUSES OF PRESENTMENT AND NOTICE.

THE WINDHAM BANK v. NORTON, CONVERSE, & Co.

(22 Connecticut, 213. Supreme Court, July, 1852.)

Unavoidable accident. — Presentment of commercial paper must be made on the day on which it becomes due, unless it is out of the power of the holder, by the use of reasonable diligence to present it. Failure of such presentment is excused by any inevitable or unavoidable accident, not attributable to the fault of the holder, provided he make presentment as soon thereafter as he is able.

THIS was an action of assumpsit, brought by the Windham Bank, as holders of a bill of exchange, against the defendants, as indorsers.

The bill of exchange referred to was drawn by George Hobart, of Norwich, in this State, upon Mansfield, Hall, and Stone, of Philadelphia, and by them accepted, for \$417.26; dated January 31, 1849, and payable four months after date, to the order of the defendants.

The declaration was in the common form, and contained the usual averments of a due presentment of the bill in question, and notice of its non-payment. The defendants pleaded the general issue, and the cause came on for trial at Brooklyn, October term, 1851. The facts were found by the Court, by agreement of the parties, as follows. Said bill of exchange, was, on the day of its date, accepted by said Mansfield, Hall, and Stone, "payable at the Farmers' and Mechanics' Bank," in the city of Philadelphia. On the — day of February, 1849, the defendants procured said draft to be discounted by the plaintiffs, and then indorsed and delivered it to them. During the same month of February, the plaintiffs forwarded said draft, by the United States mail, to the Ohio Life and Trust Co., a banking corporation in the city of New York, for collection, and indorsed the same to their cashier, as follows: "Pay G. S. Coe, Esq., cashier, or order;" signed, "Samuel Bing-

ham, cashier." The bill, so indorsed, was, in a day or two thereafter, and in due course of mail, received by said Ohio Life and Trust Co. The third day of grace, June 3d, being Sunday, the draft was actually due and payable on Saturday, June 2d. During the year 1849, there were two mails per day, each way, between New York and Philadelphia, — those for the latter place, leaving New York, one at nine A.M., the other at four and a half P.M., and both due at Philadelphia in five hours from their departure. The Farmers' and Mechanics' Bank were the Philadelphia correspondents of the Ohio Life and Trust Co., and communications by mail passed between them daily. On the morning of June 1st, the cashier of the Ohio Life and Trust Co. inclosed this draft with others, addressed in the proper and usual mode, to the Farmers' and Mechanics' Bank, and deposited said letter in the United States' post-office, at the city of New York, in season for the afternoon mail of that day for Philadelphia. That letter was duly deposited in said mail, and said mail left New York, and arrived at Philadelphia in due and usual time; but the mail-bags, containing the letters for Philadelphia, were, by the post-office clerks in the office at New York, marked to be forwarded to Washington, and were, therefore, not delivered at Philadelphia, but carried to Washington. At Washington, the mistake was discovered, and said mail-bags forwarded to Philadelphia, which place they reached in the course of Sunday, June 3d. On the morning of the next day said letter, with the draft inclosed, was delivered from the post-office at Philadelphia, to said Farmers' and Mechanics' Bank, who, by their cashier, refused payment of the same, and between the hours of nine and ten A.M. of the day placed said draft in the hands of a notary public, for protest. Said notary, between the hours of nine A.M. and three P.M. of said day presented said draft at the counter of said bank for payment, and received for answer from said cashier that he was ordered by the acceptors not to pay it, and that, had he presented it on Saturday, June 2d, he should have given him the same answer. Said notary thereupon, on said 4th day of June, in due and proper form, protested said draft, and made out written notices to the drawer and the several indorsers, of the non-payment of said draft, and inclosed said notices, with the notice of protest, in a letter, and on the same day deposited the same in the post-office in said Philadelphia, duly addressed to George S. Coe, cashier of Ohio Life and Trust Co., New York, who had indorsed said

draft to the Farmers' and Mechanics' Bank, and by whom said letter was, in due course of mail, received. Said Coe, on the same day in which he received them, inclosed said letter of protest and said notices, except the one to himself, in a letter duly addressed to the plaintiffs, and deposited the same in the city of New York in season for the next mail. The same was, in due course of mail, received by the plaintiffs, who, on the day of the receipt thereof, inclosed said notices to the defendants, as indorsers, and said notice to said drawer (his residence being unknown), in a letter duly addressed to the defendants, and deposited it in the post-office at Windham, in season for the next mail, and the same was, in due course of mail, received by the defendants. Mansfield, Hall, and Stone became insolvent, and suspended payment on the twelfth day of April, 1849, and on the next day, sent to the Farmers' and Mechanics' Bank the following notice in writing:—

“E. N. Lewis, Esq., Cash.

“You will please pay no more notes or drafts drawn by us, and payable at your bank, until further notice, as they will not be provided for.

“Very respectfully yours,

“MANSFIELD, HALL, AND STONE.”

No further notice was sent, and said bank, from that time forward, acted upon this order, and refused payment of all notes or drafts, payable at the bank, by said firm. The business hours of the Philadelphia banks, were, in 1849, from nine A.M. to three P.M. Owing to the miscarriage of the United States mail, as above stated, said draft was not presented for payment on Saturday, June 2d, when it became due, and was never presented for payment at any other time than on said fourth day of June.

It has been the usage of the banks and merchants of this country, for the last forty years, to make use of the United States mail in forwarding negotiable notes and bills of exchange, for collection or acceptance. It is the custom of the Windham Bank, and the four Norwich banks, to forward all paper in their hands, payable abroad, within five or eight days after it comes into their hands, without reference to the length of time it has to run.

The questions of law arising upon these facts, and on such further facts as the jury might rightfully infer, were reserved for the advice of this Court.

STORRS, J. The defendants first insist, that the averments in this declaration, of a due presentment of the draft in question and notice of its non-payment, must be strictly proved, and that they are not sustained by proof of the facts set up by the plaintiffs, by way of excuse. Whatever may be the course of authorities elsewhere, it is well settled here, that those allegations are supported by evidence of matter of excuse, or a waiver of demand and notice. *Norton v. Lewis*, 2 Conn. 479, and *Camp v. Bates*, 11 id. 487, are decisive on this point.

The other and more important question in this case is, whether the plaintiffs are excused for the non-presentment of this draft for payment, on the day when it became due. The last day of grace being Sunday, it was payable on the preceding Saturday, which was the second day of June, 1849. This question depends on whether the plaintiffs are chargeable with negligence, in not presenting it on that day.

If the agent of the plaintiffs, to whom they sent it, to be forwarded for presentment and collection, and who transacted this business for them, was guilty of such negligence, it is, of course, imputable to the plaintiffs. And it is not important to this question, either that the defendants in fact sustained no damage, by the draft not having been presented for payment when it fell due, or that it would not have been paid by the acceptor, if it had then been presented. The indorser, on a question of due presentment for payment, is not affected by either of these circumstances. Nor indeed do the plaintiffs claim to recover on either of these grounds.

The question of negligence here presented depends on the inquiry, whether, under the circumstances of this case, the delay of the plaintiffs' agent, in not forwarding this draft to Philadelphia, until the last mail left New York for that place, on the day next preceding that on which the draft fell due, constituted a want of reasonable or due diligence in regard to its presentment. We say, under the circumstances, because there is no positive or absolute rule of law which determines within what precise time the holder of a bill of exchange must, in all cases whatever, or at all events avail himself of the authorized mode of transmission adopted in this instance, to forward such paper for presentment. The general principle, established by all the adjudged cases, as well as the approved elementary writers is, that reasonable dili-

gence in the presentment of a bill for payment, is required of the holder, and that, therefore, if there has been no want of such diligence he is excused. Story, Bills, c. 10; Chitty, Bills, c. 9, 10; Story, Prom. Notes, c. 7, § 368; *Patience v. Townley*, 2 Smith, 223, 224.

In applying this principle, the general rule is, that it must be presented for payment on the very day on which, by law, it becomes due, and that, unless the presentment be so made, it is a fatal objection to any right of recovery against the indorser. But, although this is the general rule, it is not an universal one, and prevails only under the qualification, which is really a part of the rule itself, that there is no negligence or want of reasonable diligence in not making such presentment. The whole rule, therefore, more properly stated is, that the presentment must be on the day on which the bill becomes due, unless it is not in the power of the holder, by the use of reasonable diligence, so to present it. By the very statement of this rule, as thus fully expressed, it is plain that, on the question whether the holder is excused on this ground for not thus presenting it, or, in other words, whether there was negligence on his part, or a want of reasonable diligence, no absolute or positive rule can, from the nature of the case, be laid down which shall apply under all circumstances. We have no evidence of any general custom of merchants in regard to the precise time within which mercantile paper is usually forwarded, in order to be presented for payment, so that the law merchant furnishes us no guide on this point. And it is clear that the strict rule of the common law, by which an inability to perform the terms or condition of a contract, by reason of inevitable accident or casualty, constitutes generally no excuse for their non-performance, is not applicable to mercantile instruments of this description. Therefore, the excuse for non-presentment in this case presents the ordinary question of negligence. That question may, and often does, depend on such a variety of circumstances, or those of such a peculiar character, that it is very difficult, if not impossible, to reduce them to any fixed or invariable rule. But, in regard to such a question, as applicable to the non-presentment of a bill or note when it is due, it is considered a well-settled rule that such want of presentment is excused by any inevitable or unavoidable accident not attributable to the fault of the holder, provided there is a presentment by him as soon afterward as he is able; by which is intended that

class of accidents, casualties, or circumstances which render it morally or physically impossible to make such presentment. Judge *Story*, in speaking of this ground of excuse, says: "It has been truly observed, by a learned author," referring to Mr. Chitty, "that there is no positive authority in our law which establishes any such inevitable accident to be a sufficient excuse for the want of a due presentment. But it seems justly and naturally to flow from the general principle, which regulates all matters of presentment and notice, in cases of negotiable paper. The object, in all such cases is, to require reasonable diligence on the part of the holder; and that diligence must be measured by the general convenience of the commercial world, and the practicability of accomplishing the end required, by ordinary skill, caution, and effort." And he cites the remark of Lord *Ellenborough* in *Patience v. Townley*, 2 Smith, 223, 224, that due presentment must be interpreted to mean, presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents which must prevent the party from doing it within regular time. *Story, Bills*, § 258.

Applying these principles to this case, we are of opinion that the plaintiffs are not chargeable with a want of reasonable diligence.

No fault or impropriety is imputable to them, by reason of their having selected the public mail as the mode of forwarding the draft in question, to the bank in Philadelphia, where it was payable. It is properly conceded by the defendants that such mode of transmission was in accordance with the general commercial usage and law, in the case of paper of this description. Indeed, it is recommended in the books, as the most proper mode of transmission, as being the least hazardous, and therefore preferable to a special or private conveyance. But, although the public mail was a legal and proper mode by which to forward this paper, it was their duty to use it in such a manner that they should not be chargeable with negligence or unreasonable delay. If, therefore, they put the draft into the post-office at so late a period that, by the ordinary course of the mail, it could not, or there was reasonable ground to believe that it would not, reach the place of its destination in season for its presentment when due, we have no doubt that there would be on their part, a want of reasonable diligence, which would exonerate the indorser. On the other hand, to throw the risk of every possible accident, in that mode of for-

warding the draft upon the holder, where there has been no such delay, would clearly be most inconvenient, unreasonable, and unjust, as well as contrary to the expectation and understanding of the indorser, who is presumed to be aware of the general usage and law in regard to the transmission, by mail, of this kind of paper, and must therefore be supposed to require only reasonable diligence in this respect on the part of the holder; and would, indeed, be inconsistent with the rule itself, which sanctions its transmission in that manner. It has been suggested that the principle should be adopted, that when the holder resorts to the public mail, he should be required to forward the presentment at so early a period, that if by any accident it should not reach the place of its presentment in the regular course of the mail there should be time to recall it, and have it presented when and where it falls due; or that, at least, it should be forwarded in season to ascertain whether it reached there by that time, and to make such a demand or presentment for payment as is required in the case of lost bills. We find no authority whatever for any such rule, nor would it, in our opinion, comport with the principle now well established, requiring only reasonable diligence on the part of the holder, or with the policy which prevails in regard to such commercial instruments. It would, in the first place, be the means of restraining the transfer of such paper within such a limited time as to impair, if not to destroy, its usefulness and value, arising out of its negotiable quality; and, in the next place, it would in many cases be wholly impracticable. The casualties incident to this mode of transmission are most various in their character, and can not, of course, be foreseen; and they might, in the case of forwarding mercantile paper, be such as to render it impossible to ascertain its miscarriage, or to recall it in season to remedy the difficulty. In the case of the draft now before us, for example, if it had been placed by the plaintiffs in the post-office at Windham, where they were located, and transacted their business, for transmission, direct from thence to Philadelphia, on the very day when they became the holders of it, which was between three and four months before it became due, and, by an accident or mistake of the postmaster in the former place, similar to that which occurred in this case at New York, it had been mailed to one of the most distant parts of our country, or to a foreign country (which would not have been more singular than that it should have been mis-

takingly mailed, as in the present case, for Washington), it might not have been practicable for the plaintiffs to learn the accident, or obviate its effect before the paper fell due. In short, such a rule as that suggested, would be merely artificial in its character, productive of great inconvenience and injustice in particular cases, without any corresponding general benefits, and change the whole course of business in regard to a most extensive and important class of mercantile transactions. Nor has any other arbitrary or positive rule been suggested which is not equally obnoxious to the same or similar objections.

The only remaining inquiry is, whether the plaintiffs are chargeable with negligence for not forwarding the draft in question by an earlier mail from New York to Philadelphia. It was sent by the usual, legal, and proper mode. It was deposited in the post-office in season to reach the place where it was payable, before it fell due, by the regular course of the next mail; and there was no reason to believe that it would not be there duly delivered. It was actually sent by that mail, and, but for the mistake of the postmaster where it was mailed in misdirecting the package containing it, would have reached its proper destination, and been received there in season for its presentment when due. It in fact reached that place when it should have done; but was carried beyond it in consequence of that mistake. As that mistake could not be foreseen or apprehended by the plaintiffs, it is not reasonable to require them to take any steps to guard against it. Indeed, they could not have done so, as they had no control or supervision over the postmaster. They had a right to presume that the latter had done his duty. They could not know that he had misdirected the package until it was too late to remedy the consequences. The occurrence of the draft being sent beyond its place of destination was, therefore, so far as the plaintiffs were concerned, an unavoidable accident. It happened, not in consequence of any delay of the plaintiffs in putting the draft into the post-office at so late a period that it could not, or probably would not, reach its destination in due season, but merely in consequence of the act of the official to whom it was properly confided, done after it was properly in his charge, by the plaintiffs, for transmission. The accident, moreover, was of a very peculiar and extraordinary character, and quite different from those which are ordinarily incident to that mode of transmission, and against which it would be ex-

tremely difficult, if not impossible, to guard. It would have been equally liable to occur at any time when the draft should have been placed in the post-office. It was not owing in any sense to the fault of the plaintiffs, but solely to that of the postmaster. Under these circumstances, we do not feel authorized to impute any blame or negligence to the plaintiffs. We are, therefore, of opinion that judgment should be rendered for the plaintiffs.

In this opinion the other judges concurred.

Judgment for the plaintiffs.

Schofield v. Bayard, 3 Wend. 488, may at a cursory glance seem at variance with the above important case; but a closer scrutiny of the case will show that there is no conflict. In Schofield v. Bayard, the plaintiffs were holders of a bill payable in London. By a mistake *of their own* the bill was sent to Liverpool for presentment. The agent of the holders at the latter place mailed it back in time, indeed, if it had reached the holders when it should have reached them, to be duly sent to London; but, by a mistake at the post-office, it failed to reach the holders soon enough to be presented at the proper time. The Court held that the fault lay with the holders in sending the bill to Liverpool; and that therefore the failure to make due presentment could not be excused. In delivering the opinion of the Court, *Savage*, C. J., said: "This presents no impossibility, if due diligence had been used. The plaintiffs should not have sent the bill to Liverpool at all. It is true that, after the letter containing it had been left at Liverpool, it could not have reached London in season; but it was the fault of the plaintiffs to have parted with the bill in the manner they did. Instead of sending it to Liverpool they should have sent it to London, and then it would have been in season, and probably would have been paid. I am of opinion that, by the law merchant, payment should have been demanded in London on the twelfth of November, and that not having been done, and there being no impossibility to prevent it but what is attributable to the want of due diligence on the part of the holder, the defendants are legally discharged, and are entitled to judgment."

THE JUNIATA BANK v. HALE *et al.*

(16 Sergeant & Rawle, 157. Supreme Court of Pennsylvania, June, 1827.)

Death of maker. Indorser appointed administrator. — The death of the maker of a note before it becomes due, and the taking out letters of administration upon his estate by the indorsers and others, before the note arrived at maturity, do not dispense with the necessity of notice to the indorsers of non payment by the maker.

THE case is stated in the opinion of the Court.

DUNCAN, J. This was an action against the defendants, on a negotiable note, dated the tenth of November, 1816, for six hundred dollars, in which Starrett was the drawer, E. W. Hale the payee, Hale the first indorser, and Chriswell the second. It was a note for the accommodation of the drawer, and Hale declares, in the memorandum subjoined to it, that it was for the use of the drawer. It was payable in six months, and was discounted by the Juniata Bank. The drawer died before the day of payment ; and, on the second of December, 1816, letters of administration issued on his effects to Rebecca, his widow, Robert, his brother, and Hale and Chriswell.

On the fourteenth of May, 1817, the note was protested, but no notice of demand or non-payment was given to the indorsers, or either of them.

The Juniata Bank contended that notice of non-payment was unnecessary, inasmuch as the indorsers were two of the administrators, who, in their character of administrators, must have had knowledge of the non-payment of the note, and had all the estate of the drawer in their hands to secure themselves.

The indorsers insist, that if knowledge was proved on them of the fact of non-payment, still they were entitled to notice from the Juniata Bank, the holder of the note, of the intention of the bank to call on them. And Chriswell who is joined in the action under the act of assembly, insists further, that he should have had notice ; for although the note might not have been paid by the drawer, who died before it became due, still it might have been paid by the first indorser, and the notice of the non-payment was an important matter to him. It is further insisted by the defendants, that so far

from the bank giving notice of an intention to look to them for payment, in 1818 they obtained a judgment by confession from the administrators, a special judgment *de bonis intestati*, and not otherwise; and that they delayed to proceed on this judgment, and did not call on the indorsers until this action was brought, which was lacking a few days of six years, when the statute of limitations would have barred the recovery.

On the trial of the cause before the Chief Justice at the late Circuit Court, for the purpose of having the question settled in this Court, which is admitted to be new in species, he instructed the jury that neither the demand of payment nor notice of non-payment was necessary, and it is from this decision the defendants appealed; and on this opinion it is now only necessary for this Court to decide. From the view they have taken of this subject, if the Court did not decide on the general doctrine of the necessity of notice of non-payment from the holders of the note, the circumstances of the situation in which Chriswell, the second indorser, stood, and the judgment against the administrators, and the long delay in bringing the action, were matters worthy of serious consideration; but they have judged it most advisable to decide upon the general principle.

What is the nature of the engagement of the indorser? It is founded on the law merchant, and is governed by its principles; his undertaking is only to pay in case the maker does not pay. The indorser takes it on the condition that he will first apply to the maker; and, in an action by the indorsee against the indorser, the declaration must aver that on the note becoming due, the demand was made of the drawer, and that he refused to pay, of which the defendant had notice. It is an essential part of the plaintiff's case, and even a verdict would not cure the omission. This was decided in the Court of Errors and Appeals, and the judgment of the Supreme Court reversed. *Miles v. O'Hara*.¹ And though the declaration alleged that the drawer of the bill became liable by the custom of merchants, this is not sufficient, because the law merchant is not a matter of fact, but of law, and the want of notice is the very gist of the action; for it is that which raises the implied promise. *M'Kinney v. Crawford*, 8 Serg. & Rawle, 351, 353.

That knowledge of non-payment is not notice, is very clear; for the notice must come from the holder himself, or some one who is a party; for the notice must assert that the holder intends to stand

¹ 1 Serg. & R. 32.

on his legal rights, and to resort to the indorser for payment; and therefore, where the drawer had notice before the bill was due that the acceptor had failed, and gave another person money to pay the bill, and the holder neglected to give notice of its dishonor, it was held that the drawer was discharged. *Nicholson v. Gouthit*, 2 H. Bl. 612; *Whitfield v. Savage*, 2 Bos. & Pul. 277; *Esdaile v. Sowerby*, 11 East, 114, 117. And where a few days before the bill became due, the acceptor informed the drawer that he must take it up, and gave him part of the money to assist him in so doing, and the latter promised to take up the bill accordingly, it was held the latter might nevertheless set up, as a defence, that the bill was not duly presented for payment, and that he had not regular notice of the dishonor. *Baker v. Birch*, 3 Camp. 107. The notice must come from one who can give the drawer or indorser his immediate remedy on the bill, and not from a stranger; otherwise it is merely an historical fact; it must be legal notice, otherwise the party is discharged from the liability he contracted by indorsing it. 2 Cowp. 177; *Chitty, Bills*, 292. The reason given in *Ex parte Baizley*, 7 Ves. Jr. 597, is very satisfactory: for the ground of discharging the drawee is, that the drawer gave credit to some other person liable, as between him and the drawer. Notice from any other person than the holder that the note is not paid, is not notice that the holder does not give credit to a third person. This is very strongly put by *Ashhurst and Buller, JJ.*, in *Tindal v. Brown*, 1 T. R. 167. According to *Ashhurst*, "notice means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that the holder does not intend to give credit to such maker; the party ought to know whether the holder intends to give credit to the maker, or to resort to him." And, by *Buller, J.*, it was said, "The notice ought to purport that the holder looks to the party for payment, and a notice from another party cannot be sufficient: it must come from the holder." And this doctrine of *Buller* has been acted upon in many cases there, as Lord *Eldon* observed in *Baizley's Case*. Now, here these indorsers ought to have had notice from the Juniata Bank: for that would be notice that they did not mean to resort to the estate on which, with others, they had administered, but to them in the character of indorsers; whereas, by not giving notice, they had a right to conclude the bank intended to look to the drawer. And, accord-

ing to *Ashhurst's* opinion, they had a right to know from the holder, the Juniata Bank, that they intended not to give credit to the estate of John Starrett, but to look to them personally as indorsers.¹

The argument that the indorsers received no injury from the want of notice does not now hold. Whatever vacillation prevailed in courts for a time, it is now settled that the insolvency of the drawer of a note does not dispense with the necessity of demand and notice of non-payment. Between the parties to the notice the rule is inflexible, and it is not open to the inquiry whether notice could have availed the indorser. The holder has no right to speculate and judge what may be the interest of the parties; his duty is a plain one, — to give notice; and, if that rule is dispensed with, it opens a door for endless litigation and perplexing inquiries. Death, bankruptcy, notorious insolvency, or the drawer's being in prison, constitute no excuse either in law or equity. *Gibbs v. Gannon*, 9 Serg. & Rawle, 201. Notice to one of several partners who are joint indorsers, is notice to all; and, if one of the drawers of the bill be also an acceptor, and there is no fraud in the transaction, no notice, in fact, is necessary to the others. Neither is notice necessary to a party who by his conduct dispensed with it, as, by engaging to call on the holder, and ascertain whether the acceptor has not paid the bill. *Chitty, Bills* (Carey & Lea's ed.), 297. So, if the drawer of a bill promises to pay, this is a waiver of the objection of the want of notice, where the party knew all the facts and the legal consequences. But it has been recently held, that though the drawer of a bill may impliedly waive his right of defence, founded on the laches of the holder, yet an indorser can only do so by an express waiver. *Borradale v. Lowe*, 4 Taunt. 93, 96, 97; *Brown v. M'Dermot*, 5 Esp. 265. And there is, in all those cases of want of notice, a material and essential difference between the drawer of a bill and the indorser; for, if the drawer of a bill had no effects in the hands of the drawee or acceptor, and the bill is drawn for the accommodation of such drawer, he is *prima facie* not entitled to notice of the dishonor of the bill, nor can he object in such case.² He, being the real debtor, acquires no right of action against the acceptor by paying the bill, and suffers no injury from want of notice of non-acceptance or non-payment (12 East, 171), and therefore, the laches of the holder affords him no

¹ See *Chanoine v. Fowler*, *ante*, 383, and note.

² See *Hopkirk v. Page*, *post*, 430.

defence. 4 Taunt. 733. But it is no excuse for not giving notice to the indorser of a bill, that the acceptor had no effects. Peake, 202. "That circumstance," said Lord *Kenyon*, "will not avail the plaintiff. The rule extends only to actions brought against the drawer ; the indorser is, in all cases, entitled to notice." See *Chitty*, 259, 295.

It has been attempted to bring this within the principle of *Bond v. Farnham*, 5 Mass. 170, and *Barton v. Baker*, 1 Serg. & Rawle, 334;¹ but those cases were decided on very different grounds. In the first, Chief Justice *Parsons* says: "The opinion was founded on this, that if the indorser, representing himself liable for the payment of particular indorsements, receives a security to meet them he shall not afterwards insist on a fruitless demand upon the maker, or a useless notice to himself, to avoid payment of demands, which on receiving security he has undertaken to pay." In the latter, the late Chief Justice put it on the ground that it was not unreasonable to suppose that the defendant took upon himself the payment of the indorsed notes, and on no other ground could it be held that the notice of non-payment was not necessary.

But here the indorsers had no security beyond any other simple contract condition of John Starrett; they obtained no advantage beyond strangers to the administration; for, by the death of the intestate, his goods and lands were seized by act of law, by a kind of statute execution in the hands of his administrator, just as in the case of a commission of bankruptcy, and to be discharged in a prescribed order; in which the administrator cannot prefer himself or retain his own debt, as he could by the laws of England. The lands, the fund here for the payment of debts, do not come into the possession of the administrator; he has no right of entry, and can bring no ejectment; the possession descends to the heir. The executor or administrator, have, by virtue of their office, in no case a right to the possession of the deceased's lands. As I do not find the case of an indorser becoming an administrator to the drawer, in any decision among the books of authority, to form an exception to the necessity of giving notice to the drawer, and as there is no reason why it should, I am not for relaxing one jot further than it has been done, this wholesome and convenient rule. Indeed we find judges regretting that it had ever been departed from in any case.

¹ *Post*, 458.

The Chief Justice, who decided the case in this Court, for the purpose of bringing this new question before the Court, joins in the opinion of the other members of the Court, that the indorsers not having received notice of non-payment, are not liable on the indorsement, and that the appeal be sustained.

The rule of demand and notice is one of universal obligation. I would not extend the exceptions further than to the cases which have been expressly decided. Policy and the convenience of the public require a rigid adherence to the rule; for, otherwise, exception would creep in after exception, and leave the law, which ought to be certain, open to speculation and to doubt.

Judgment reversed.

The Supreme Court of the United States, in 1830, declared the same rule in the case of *Magruder v. Union Bank of Georgetown*, 3 Peters, 87, and re-affirmed it in the same case, 7 Peters, 287. The decision in *Caunt v. Thompson*, 7 Com. B. 400, has perhaps been somewhat misunderstood. That case does not decide that where the party sought to be charged has become executor of the payor, notice is dispensed with, but that the circumstances in that particular case constituted notice. It was proved at the trial that the bill in the case was duly presented at the house of the acceptor; and that the defendant (the drawer), to whom it was there shown, said that the acceptor was dead, and that he was his executor; adding a request that it might be allowed to stand over for a few days and he would see it paid; and it was held that this was sufficient notice of dishonor. It will be seen that the drawer's knowledge of the dishonor, which was held to constitute notice, came from the holder and proper party. It was not a mere "historical fact," which the drawer may have derived from a stranger, but it was *legal notice* within the rule laid down in the principal case. It was immaterial, as the Court held, that the notice was not given with all the formalities which are usual, so long as it was given by the holder. The very important distinction drawn in the principal case between knowledge and notice is also maintained in *Caunt v. Thompson*. *Cresswell, J.*, quotes with approval the following language of *Alderson, B.*, in *Miers v. Brown*, 11 Mees. & W. 372: "Knowledge of the dishonor obtained from a communication by the holder of the bill amounts to notice." Also the following language of *Ashhurst, J.*, in *Tindal v. Brown*, 1 T. R. 167: "Notice means something more than knowledge; because it is competent to the holder to give credit to the maker." Mr. Justice *Cresswell* proceeds to say: "In substance these cases seem to establish that, in order to make a prior holder responsible, he must derive from some person entitled to call for payment information that the bill has been dishonored, and that the party is in a condition to sue him, from which he may infer that he will be held responsible." See *Chanoine v. Fowler*, *ante*, 383, and note; also *Gower v. Moore*, 25 Me. 16.

We do not see then that there is any conflict between *Caunt v. Thompson* and the principal case; though it must be admitted that the former goes to the verge of the law.

But there may be an exception to the rule in those States in which the personal

representative is allowed by statute a certain period for settling the estate of the payor, during which time he cannot be sued. And it has been held that, if the maker of a note die and an administrator be appointed before the note fall due, demand upon the latter is not necessary to charge an indorser, unless the paper fall due after the period during which the administrator is exempt from suit. *Hale v. Burr*, 12 Mass. 86. But this was not the case of an indorser appointed administrator.

Shepley, J., in *Gower v. Moore*, 25 Me. 16, cites this case as an exception, and states that the doctrine of it is questionable; but it has been followed in Massachusetts in *Oriental Bank v. Blake*, 22 Pick. 206, and in Louisiana in *Landry v. Stansbury*, 10 La. 481.

But in *Gower v. Moore* it is held that if the maker of a note die before its maturity, the indorsee should make inquiry for his personal representative if there be one, and present the note to him at maturity for payment.

It would seem advisable, if not necessary, to present the paper at maturity, even where the personal representative is exempt from suit for a certain time, — which is believed to be generally the case throughout the United States, — and give notice to the indorser or drawer of the payor's death and of the matter of administration, so that he may take the proper measures to secure himself in case the paper is not finally paid. There is a strong reason for this where the indorser is not aware of the payor's death; for in that case if notice were not given he would be led to suppose that the paper had been duly paid, and thus be thrown off his guard, and perhaps lose altogether an opportunity to secure himself in the event of non-payment from the estate of the payor. And the modern inclination of the courts is to adhere more strictly than formerly to the rule requiring presentment and notice. See *Pierce v. Cate*, 12 Cush. 190.

Putnam, J., in *Oriental Bank v. Blake*, 22 Pick. 206, after stating the rule laid down in *Hale v. Burr*, *supra*, states an important *non sequitur*, involving the point in issue in the case before him. He says: "But it does not follow that because to charge an indorser, no demand is necessary to be made on the administrator of the maker of a note, or the acceptor of a bill of exchange falling due within the year after the appointment, notice of the dishonor of the bill is not necessary to be given to the administrator of the indorser in a reasonable time. He stands in the place of the indorser; and a want of notice of the dishonor of the bill may be prejudicial to all persons interested in the estate of his intestate. He, for example, may have paid to the party liable to him upon the bill, money which he might have retained, or have otherwise omitted to obtain, security against the undertaking of his intestate. To the same effect is *Merchants' Bank v. Birch*, 17 Johns. 25.

In *Haslett v. Kunhardt*, Rice (S. Car.), 189, the maker of a note payable May 25th, was drowned, with his whole family, two or three days before the maturity of the paper. Notice was given to the indorser on the 25th. The maker had left no will, and, up to the time of notice, no administration had been or could have been taken out. It was held that demand was excused; *Richardson, J.*, dissenting. See also *Price v. Young*, 1 McCord. 339; s. c., 1 Nott & M. 438.

JAMES HOPKIRK, surviving partner of SPIERS, BOWMAN, &
Co., v. WILLIAM BYRD PAGE, Executor of WILLIAM BYRD.

(2 Brockenbrough, 20. Circuit Court of the United States for Virginia,
May, 1822.)

Drawing without funds. — If the drawer have no funds in the hands of the drawee at the time of drawing, and no right to draw, and has the strongest reasons to believe that his draft will not be paid, he is not entitled to notice of dishonor.

Effect of war. — The effect of war is to suspend all commercial intercourse between the countries engaged in it; and therefore presentment and notice will be excused during the continuance of hostilities. But these steps should be taken within a reasonable time after the cessation of the war.

THE case is stated in the opinion of the Court.

MARSHALL, C. J. This suit is brought to obtain payment of two bills of exchange drawn by the late William Byrd, of Virginia, on Robert Cary & Co., merchants of London, the one in the year 1774, and the other in 1775. These bills were regularly protested; but the defendant makes several objections to paying them. The first to be considered is, that no notice of their non-payment and protest was given either to William Byrd in his lifetime, or to his representatives, since his death.

The plaintiff contends that this notice was unnecessary, because the drawer had no funds in the hands of the drawee.

Although this application, in consequence of the state of the fund to which the plaintiff must resort, it consisting of equitable assets, is made to a court of equity, it is admitted to be a law case depending entirely on legal principles. It requires an attentive consideration of the question, how far the want of funds of the drawer in the hands of the drawee discharges the holder of a bill of exchange from the necessity of giving notice to the drawer of its dishonor.

The rule requiring this notice was for a long time supposed to be general, and Mr. Justice *Blackstone* in his Commentaries lays it down without any exception. The first case in which an exception was admitted, is *Bikerdike v. Bollman*, decided in Novem-

ber, 1786, and reported in 1 Durn. & East, 405; in that case the Court stated, that if it be proved by the holder that "from the time the bill was drawn till the time it became due, the drawee never had any effects of the drawer in his hands," notice to the drawer is not necessary. The reason given is, that he had no right to *draw*, and *could not be injured* by not receiving notice. An additional observation made by one of the judges is, that to draw in such a case "is a fraud in itself."

It does not appear from the report of this case, nor is there any reason to believe, that there were any running accounts between the parties: the whole complexion of the case; and the reasons assigned by the judges for their opinions, negative the idea; it is simply the case of a debtor drawing a bill on his creditor, without a prospect of its being paid. In such a case, notice is declared by the Court to be unnecessary.

It is remarkable that in this case, although the principle is expressly asserted by both the judges, each declares that the case would be decided in the same way on a different principle.

In Goodall and others v. Dolley, decided in 1787, 1 Durn. & East, 712, the judgment was against the holder of the bill, for want of notice; but in giving his opinion, Mr. Justice Buller recognizes the principle established in Bikerdike v. Bollman.

In Rogers v. Stevens, 2 T. R. 713, decided in 1788, the law is said to be settled, that no effects of the drawer in the hands of the drawee, excuses the holder from the necessity of giving notice, yet, it is remarkable that in this case, all three of the judges rely very much on a subsequent assumpsit made by the drawer.

In Gale v. Walsh, 5 T. R. 239, decided in 1793, the principle appears to be recognized; but a rule to show cause why a new trial should not be granted for this cause, was discharged, because the fact did not exist in the case.

These are the earliest cases on this point: it has occurred very frequently in subsequent cases, and the principle seems to be firmly established; but as the question has come forward in different forms, and been viewed under different aspects, the principle has been greatly modified, and is no longer laid down in the general terms which were carelessly used on its introduction. It has been found necessary to define its extent with more precision, and to state the rule with more accuracy. It was perceived, that in the course of commercial dealing, it would frequently occur that a

person might draw a bill with the best reasons for believing that it would be honored, although, in fact, he might have, at the time, no funds in the hands of the drawee; and that all the reasons for requiring notice, would apply in such a case, with the same force as if the bill had been drawn on actual funds. In *Legge v. Thorpe*, 12 East, 171, *Le Blanc* and *Bayley*, JJ., stated the principle laid down in *Bikerdike v. Bollman*, and afterwards adhered to, in these terms:

They said, "that the Court in that case, looking to the reason for which notice was required to be given, laid down the rule, *not generally*, that where the drawer had no effects in the hands of the drawee at the time (which perhaps might turn out to be the case upon a future settlement of accounts between them) no notice of dishonor should be given: but that it need not be given where the drawer *must have known* at the time that he had *no effects* to answer the bill, and could have no reason to expect that his bill would be honored."

In *Blackhan v. Doren*, 2 Camp. 503, Lord *Ellenborough* said: "If a man draw upon a house with whom he has no account, he knows that the bill will not be accepted, he can suffer no injury from want of notice of its dishonor, and, therefore, he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee."

In *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652, one of the strongest cases in the books in favor of dispensing with notice, *Eyre*, C. J., said: "But it may be proper to caution bill-holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands, notice is not necessary. The cases of acceptances on the faith of consignments from the drawer, not come to hands, and the case of acceptances on the ground of fair mercantile agreements, may be stated as exceptions, and there may possibly be many others."

In *Brown et al. v. Maffey*, 15 East, 216, Lord *Ellenborough* said: "The doctrines of dispensing with notice of the dishonor of a bill has grown almost entirely out of the case of *Bikerdike v. Bollman*. That decision dispensed with the notice to the drawer, where he knew beforehand that he had no effects in the hands of the drawee, and had no reason to expect that the bill would be paid when it became due."

"But that exception must be taken with some restrictions,

which, since I sat here, I have often had occasion to put on it, as where the drawer, though he might not have effects at the time of the drawing of the bill in the drawee's hands, has a running account with him, and there is a fluctuating balance between them, and the drawer has reasonable ground to expect that he shall have effects in the drawee's hands when the bill becomes due. In such cases, I have always held the drawer to be entitled to notice, because he draws the bill upon a reasonable presumption that it will be honored."

In *Rucker et al. v. Hiller*, 16 East, 43, Lord *Ellenborough* said: "Where the drawer draws his bill in the *bona fide* expectation of assets in the hands of the drawee to answer it, it would be carrying the case of *Bikerlike v. Bollman* farther than has ever been done, if he were not at all events entitled to notice of the dishonor. And I know the opinion of my lord chancellor to be, that the doctrine of that case ought not to be pushed farther."

"The case is very different where the party knows that he has no right to draw the bill. There are many occasions where a drawee may be justified in refusing from motives of prudence to accept a bill, on which notice ought nevertheless to be given to the drawer; and if we were to extend the exception farther, it would come at last to a general dispensation with notice of the dishonor, in all cases where the drawee had not assets in hand at the very time of presenting the bill, and thus get rid of the general rule requiring notice, than which nothing is more convenient in the commercial world. A *bona fide* reasonable expectation of assets in the hands of the drawer has been several times held to be sufficient to entitle the drawer to notice of the dishonor, though such expectation may ultimately fail to be realized."

And in the same case, *Bayley, J.*, said: "The general rule requires notice of the dishonor to be given in due time to the drawer, and it lay upon the plaintiff to show that he could not possibly be injured by the want of it. It would be somewhat hard to call upon the drawer towards the end of six years after the bill given; and when he objected that he had no notice of the dishonor, to tell him that he had no effects in the drawee's hands at the time when the bill was presented, though they might have come to his hands the very day after, and the drawee might have settled his accounts with the drawer on the presumption that the bill was paid."

The subject was considered by the Supreme Court of the United States, in the case of *French v. The Bank of Columbia*, reported in the fourth volume of Cranch. 4 Cranch, 141, 2 Cond. 58. In that case, it was said, “to be the fair construction of the English cases, that a person having a right to draw in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and, therefore, as not coming within the exception to the general rule.” When the drawer is continually making consignments to the drawee, and continually drawing on those consignments, his conduct may be essentially affected by knowing that any of his bills have been protested. He may stop *in transitu*, or may suspend further consignments. It may be as material to his interest to place no more funds in the hands of the drawee in such a case, as to withdraw the funds previously placed in his hands. Notice may be as important to him in the one case as in the other, and there seems to be the same reason for requiring it, supposing the rule to be, that every person having a *right to draw*, or having reason to believe that his bill will be honored, is entitled to notice. I will proceed to apply the principle to the facts of this case; and, in doing it, I shall consider the two bills separately.

On the nineteenth of July, 1774, William Byrd drew on Robert Cary & Co., in favor of Edward Brisbane, for the sum of £353 6s. This bill was indorsed by Edward Brisbane to Alexander Spiers, and by him to the company. On the seventeenth of November, 1774, it was protested for non-payment. The first information that appears to have been given of this protest to Colonel Byrd, or his representatives, was the institution of this suit in 1819.

The executor of Byrd resists its payment for want of notice, and the plaintiff alleges that notice was unnecessary, because the drawer had no effects at the time in the hands of the drawee. To support this allegation, he relies on several letters written by Robert Cary & Co. to William Byrd, which have been exhibited by the executor on his requisition.

The defendant objects to this testimony, that the letters are the mere allegations of Robert Cary & Co., and do not contain a full statement of the correspondence between the parties, or of their accounts; that Colonel Byrd may not have acquiesced in the accounts transmitted with these letters, or in the statements they contain,

although, from the loss of papers, the death of parties, and the great lapse of time, the papers cannot now be produced.

The general rule is, that a long acquiescence in letters containing accounts, is *prima facie* evidence of an acquiescence in their contents; and there is less reason for excepting this case from the rule, because the letters of Robert Cary & Co., from November, 1773 to October, 1775, do not notice any objection on the part of William Byrd to any of the accounts which, one of those letters says, were annually transmitted to him.

The letter from Robert Cary & Co. to William Byrd, dated the tenth of November, 1773, incloses an account current, showing a balance due Robert Cary & Co. of £616 9s. 1d. This letter gives notice of the completion of a contract for the sale of Byrd's English estate; says the money is to be paid the fifth of April; that they shall immediately afterwards take up the whole of his bills; and says that they have referred Farrell and Jones to him, to determine whether they shall pay a debt of about £800, claimed by Farrell and Jones.

The next letter is dated the thirteenth of May, 1774. It states the receipt of £5000 on account of the estate which had been sold, and the expectation of receiving the farther sum of £11,500 on the same account. It states the payment of debts to the amount of £5544 7s. 4d. and gives a list of other debts due from Byrd, to the amount of £11,577. The letter concludes with saying, that by Greenland's estimate, the produce of the estate will not exceed £15,500, out of which great charges are to be deducted. From this sketch the letter proceeds: "You will be able to judge how the account may stand, and what bills must be returned."

It is observable, that among the debts paid, are several bills of exchange, which had been long protested, one of them as early as February, 1768. This fact shows an understanding by which bills were held up after a protest, in the expectation that they would be paid by the drawee, notwithstanding the protest. In such a case, if no notice be given, the law seems to be, that the holder looks to the drawee, not to the drawer for payment.

The next letter, of the fifth of August, 1774, states that there are many bills which must be returned, after paying all the money received on account of the English estate. This letter speaks of a further sum for a half year's rent, accruing before the purchaser took possession, to be received after Michaelmas. This would be

£371 4s. 6d. There is, too, a subsequent letter, of the fourteenth of March, 1775, which mentions a farther receipt of £448 12s. 1d., on account of the English estate.

Colonel Byrd appears to have drawn to the full amount of his English estate, so far as Robert Cary & Co. had stated the money to have been received; and if the transactions between the parties had gone no farther, these letters would furnish strong reasons for the opinion that, in July, 1774, he acted at least incautiously in drawing the bill under consideration. But there were transactions between the parties. Colonel Byrd held a large estate in Virginia, and the usage of the considerable planters to ship their tobacco to London merchants, and to draw on their consignments, is of general notoriety. In their letter of the seventeenth of November, 1774, Robert Cary & Co. say: "We shall, in the disposal of your tobacco, hope to render you a safe and pleasing tale."

In a letter of the tenth of February, 1775, is an account of sales of fifteen hogsheads of tobacco, shipped in a vessel commanded by Captain Powers; and there is also notice taken of a mortgage on the estate sold to Mrs. Otway, for which no claimant had appeared, but for which Mrs. Otway had retained a considerable sum in her hands. The letter says: "We were compelled to settle the conveyance in the manner we did, yet at the same time, it no ways precluded you from receiving your part of this other mortgage, if no claimants." The letter shows that Colonel Byrd had written on this subject, and had manifested the expectation of receiving a further sum on this account. The letter mentions the payment of some small orders given by Byrd.

It may be considered as probable, from these letters, that Colonel Byrd was not perfectly satisfied with the sums retained on account of charges on the estate, and expected more money from it.

A letter of the twentieth of June, 1775, states the payment of a draft drawn by Colonel Byrd, in favor of Hornsby, for £75. and their payment for his honor of another draft on Farrell and Jones for the same sum.

The last letter is dated second of October, 1775. It mentions the payment of several little drafts, as desired by Colonel Byrd, "which are mentioned in an account current inclosed," but the account itself does not appear. It shows a balance, as the letter says, of 16s. 11d. in favor of Colonel Byrd.

From this review of the letters in the cause, it is obvious that

Colonel Byrd was much pressed for money ; that he was sanguine in his calculations of the sums to be yielded by his estate in England ; that he drew upon that fund by anticipation, and to an amount greater perhaps than was strictly justifiable. It is also apparent that a considerable part of the money for which the estate sold was retained for incumbrances, some of which were questionable, and there is reason to believe that he questioned them. It is also apparent that there were running transactions between the parties, and that the holders of his bills were in the habit of retaining them, and of receiving payment long after protest. That he made shipments of tobacco in the time, is unquestionable ; but the amount of his shipments is uncertain ; his letters are not produced ; they would throw much light on this transaction. The letters giving notice of this particular draft, might, and probably would, show the idea on which it was drawn, and the calculations of the drawee ; it might be drawn on actual consignment of tobacco, or it might be drawn on a calculation that something farther might be yielded by those items of the English estate, which the letters show had not finally been adjusted. These calculations may have been erroneous ; but if they were made, the bill was not drawn with a knowledge that it would not be honored, and therefore notice of its dishonor was unnecessary. The Court will not presume that these calculations were made ; the Court will not presume that the letter of advice which usually accompanies a bill of exchange, did show that the drawer calculated on his bills being honored ; but the Court cannot presume the contrary ; and it is to be recollected that when a protested bill is held up for a great length of time without notice, the whole *onus probandi* is thrown on the holder ; he must prove every thing, and nothing is required from the drawer.

The case furnishes strong reason for the opinion, that this bill was not returned to Virginia, but was held up by Spiers, Bowman, & Co. in the expectation of its being paid by Robert Cary & Co. It was drawn on the nineteenth of July, 1774, and protested for non-payment on the twenty-sixth day of November of the same year. Another bill for £213 15s. drawn on the fourth of July, 1774, in favor of Spiers, Bowman, & Co., and protested on the ninth of November, 1774, was returned to Colonel Byrd, and was taken up ; these bills drawn by the same persons, and held by the same house, at the same time, would probably have been returned

by the same vessel had they been both returned. The circumstance that one was drawn in favor of Brisbane, an agent of the company, and indorsed by him to a member of the company, and by that member to the company, would not account for the appearance of one bill without the other, if both were returned. They were both the property of the same company, both due by the same person, both in possession of the company at the same time, and would probably have been both returned, if they *were* both returned by the same vessel. The bill, said not originally to have been drawn in favor of Spiers, Bowman, & Co., would probably have been transmitted to the same agent to whom the other bill was transmitted. The appearance of the one bill without the other is, then, a strong circumstance in favor of the opinion that the bill retained was held up in England in the expectation of its being paid by the drawee. In estimating the probabilities of the circumstances and prospects under which the bill was drawn, this fact is entitled to some consideration.

We have no regular accounts, no statements of the consignments made by Byrd to Robert Cary & Co. We know that their connection was of long standing; that there was a considerable degree of mutual kindness and confidence; that Byrd was in the habit of shipping tobacco to Robert Cary & Co., that there may have been a shipment at the very time this bill was drawn; that money was paid for Byrd by Robert Cary & Co., after this bill was protested; that a bill of £75 was taken up for his honor; and that in October, 1775, the balance of £616 9s. 5d., which stood against him in November, 1773, was converted into a balance of 16s. 11d. in his favor. We have not all the intermediate accounts, and we do not know how this balance may have fluctuated; add to this, that the bill is not said to have been protested for want of effects.

Under all these circumstances, I cannot say that the bill was drawn with a knowledge that it would be protested; and that notice of the protest could not be necessary. I cannot say that it was a fraud upon the payee, by giving him a bill which the drawer knew would not be paid. If the *onus probandi* lay on the drawer of the bill, the case would be clearly against him; but as it lies entirely on the holder, whose laches are without a precedent in a court of law or equity, I think he has not made out a case of complete justification, on which he can entitle himself to a decree for the bill drawn on the nineteenth of July, 1774.

The second bill was drawn on the twenty-sixth day of November, 1775, for £246 3s. 7d., and was protested on the twenty-sixth day of June, 1776. It was drawn after the commencement of hostilities in Virginia; and before it was protested all intercourse between the two counties was interdicted. Under these circumstances, notice is not to be expected and ought not to be required. I at first doubted whether a bill, which, for a length of time, is held under circumstances which dispense with notice, does not lose its commercial character, and become an ordinary debt. But on reflection, I am satisfied that this idea cannot be sustained: and that to charge the drawer, notice of the dishonor of his bill ought to be given within a reasonable time after the removal of the impediment. The question, therefore, on this bill, also is, were the circumstances under which it was drawn such as to dispense with notice? Was it drawn without reasonable ground for an expectation that it would be paid? It may reasonably be supposed that, on the twenty-sixth of November, 1775, the letter of the second of October, 1775, which came by the last packet to New York, was received. In attempting to show that notice of the dishonor of this bill was unnecessary, because the drawer had no effects in the hands of the drawee, the holder is met *in limine*, by the fact that this letter shows a balance in his favor of 16s. 11d. and the exception under which the plaintiff withdraws himself from the general rule is, that the drawer had at the time no effects in the hands of the drawee. If we may depart from the letter of the exception, there is no point at which to stop: and if notice may be dispensed with when a small sum is in the hands of the drawer, it may also be dispensed with when a large sum is in his hands, provided that sum be one cent less than the bill is drawn for.

I am aware of this argument, but think it more perplexing than convincing. There are many questions in which no precise line can be marked, which must depend on sound legal discretion, and where the case itself must be decided by a jury or by the Court, acting on the principles which ought to regulate a jury. The sound sense and justice of the exception is, that where a drawer knows he has no right to draw, and has the strongest reason to believe his bill will not be paid, the motives for requiring notice of its dishonor do not exist, and his case comes within reason of the exception. Where all transactions between parties have ceased,

and there is nothing to justify a draft but a balance of one penny, it would be sporting with our understanding to tell us, that a creditor for this balance, who should draw for a thousand pounds, would be in a situation substantially different from what he would be in, were he the debtor in the same sum. The true inquiry appears to me to be, whether the connection between William Byrd and Robert Cary & Co. remained such as to justify a hope that his bill would be honored, and to afford any shadow of justification for drawing it.

I think it as demonstrable as any proposition of this sort can be, that he knew that this bill would not be paid.

He had no funds in the hands of the drawee except 16s. 11*d.*, and no prospect of having any. He had made no shipment of tobacco by the last vessel, and Robert Cary & Co. speak of the fact with some resentment. In their letter of June, 1775, they had mentioned sending a vessel to Virginia chartered at a high price, in which they expected consignments of tobacco from their friends, and, among others, from Colonel Byrd. In their letter of the second of October, they say: "When Power came in, we were in hopes you would have offered him some assistance, but we observe the high price in the country was the cause of the disappointment, and no compliment to our charter. However, if we are no losers, we are not beholden to our friends for it."

With respect to the mortgage for which it had been supposed that the mortgagee was dead without a representative, he says, "it is feared the representative is found; but be this as it may," he adds, "the estate will be always liable, and therefore, without a proper indemnity, little can be expected. What indemnity you may offer we know not, but we shall not engage for our own parts." After mentioning the payment of some bills, they add, "but for paying any more, or raising money on the uncertainty of the mortgage, we shall not attempt."

With this letter before him, Colonel Byrd must have drawn, I think, with a moral certainty that his bill would be dishonored: and if in any case a holder can be excused for not giving notice, this is that case. There was an end of all consignments, of all intercourse between the parties; there were no funds to withdraw, and no remittances to stop. The want of notice would be no injury to him. This case seems to me to come within the exception of *Bikerdike v. Bollman*, as modified in the subsequent cases.

Dorsey, J., in *Cathell v. Goodwin*, 1 Harris & G. 468, 471, thus states what is meant by reasonable ground to expect that the drawer's bill will be honored: "The 'reasonable grounds' required by law, are not such as would excite an idle hope, a wild expectation, or a remote probability, that the bill might be honored; but such as create a full expectation, a strong probability of its payment; such indeed as would induce a merchant of common prudence and ordinary regard for his commercial credit, to draw a like bill."

The above language is quoted with approval in *Orear v. McDonald*, 9 Gill, 350, 357, and *Martin, J.*, adds: "The right to demand and notice does not depend upon the fact that the drawers had, at the maturity of the draft, funds in the hands of the drawees, as ascertained by ulterior events, adequate to its payment. There is to be found in the adjudications on this subject, no such stringent rule. On the contrary, we consider the principle as now established to be that if the drawers, at the time when the bill should have been presented, had the right to expect, reasoning upon the state of facts connected with the transactions as they then existed between the drawees and themselves, that their bill would be honored, they were entitled to demand and notice." See also, to the same effect, *Clopper v. Union Bank*, 7 Harris & J. 92, 102; *Kupfer v. Bank of Galena*, 34 Ill. 328, 351; *Wood v. Price*, 46 Ill. 435; *Walker v. Rogers*, 40 Ill. 278; *Valk v. Simmons*, 4 Mason, 113; *Adams v. Darby*, 28 Mo. 162; *Kingsley v. Robinson*, 21 Pick. 328, *Shaw, C. J.*; *Rhett v. Poe*, 2 How. 457; *Dickens v. Beal*, 10 Peters, 577; *Williams v. Brashear*, 19 La. 370; *Youngue v. Ruff*, 3 Strob. 311; *Wollenweber v. Ketterlinus*, 17 Penn. State, 389; *Oliver v. Bank of Tennessee*, 11 Humph. 74; *Farmers' Bank v. Van Meter*, 4 Rand. 553; *Miser v. Trovinger*, 7 Ohio State, 281; *Cook v. Martin*, 5 Sm. & M. 379; *Spear v. Atkinson*, 1 Ired. 262; *Claridge v. Dalton*, 4 Maule & S. 230; *Blackham v. Doren*, 2 Camp. 503. These and many other cases hold that the presence or absence of funds in the hands of the drawee is not the criterion by which to determine whether the drawer is entitled to notice or not; but that the true test is whether or no he has reasonable ground to expect his bill to be honored. The weight of authority is almost altogether this way; though the doctrine has been denied in Alabama. See *Shirley v. Fellows*, 9 Port. 300; *Foard v. Womack*, 2 Ala. 368. An opposite opinion had been entertained in the earlier case of *Hill v. Norris*, 2 S. & P. 114. But *Foard v. Womack* is approved in *Tarver v. Nance*, 5 Ala. 712. See also — *v. Stanton*, 1 Hay. 271. Two New York cases (*Hoffman v. Smith*, 1 Caines, 157, 160, and *Commercial Bank of Albany v. Hughes*, 17 Wend. 94) were cited in *Foard v. Womack*, as authority for the decision in that case, but the doctrine of the principal case does not appear to have been raised in either case. *Jewett, J.*, in *Dollfus v. Frosch*, 1 Denio, 367, also states that the absence of funds is sufficient excuse for failure to notify the drawer, but he immediately quotes as authority the language of *Story, J.*, in *Valk v. Simmons*, 4 Mason, 113, that "no notice was necessary when the acceptor had not in fact or in the expectancy of the drawer, any funds in his hands at the time of payment, nor had entered into any arrangement with the drawer at all events to pay the bill." And again: "He was then, to say the least of it, in the predicament of a party drawing without funds, and having no right to expect the bill to be paid."

But the point was directly decided in *Robinson v. Ames*, 20 Johns. 146; and the same rule adopted as that laid down in the principal case. *Spencer, C. J.*, said:

"I am entirely satisfied that there is no foundation for saying the defendants are precluded from setting up laches, because they had no right to draw the bill. The case of *Bikerdike v. Bollman*, 1 T. R. 405, is considered the first case deciding that notice to the drawer of the dishonor of the bill was unnecessary; and in that case the drawer had no funds, and knew he had none, in the hands of the drawee. The drawing the bill was considered a fraud, and it was held that he was not entitled to notice, and could not be injured by the want of it. It has, however, since that case, repeatedly been decided that, where there are any funds in the hands of the drawee, so that the drawer has a right to expect the bill will be paid, or where there are not any funds, yet if the bill was drawn under such circumstances as induced the drawer to entertain a reasonable expectation that the bill would be accepted and paid, the person so drawing it is entitled to notice; and *a fortiori*, he is entitled to have the bill duly presented. The rule is correctly laid down in *Claridge v. Dalton*, 4 Maule & S. 229, by Lord *Ellenborough*. The principle which has been stated is very ably supported by Chief Justice *Marshall*, in *French v. The Bank of Columbia*, 4 Cranch, 153, where the principal authorities are reviewed. There is nothing more important than that, in questions of a general mercantile nature, there should be a uniformity of decision; and, although the justice and equity of this rule may not in some cases be perceived, where the payee has purchased a bill, and it is drawn in good faith, and no conceivable loss has happened by the want of notice, yet, as there may be cases where, though there were no funds in the hands of the drawee, the drawer may be injured by the want of notice, it is better that the rule on the subject should be general and uniform throughout the mercantile world."

In *Benoist v. Creditors*, 18 La. 522, it was held that where the drawers depended on the issue of a lawsuit, they could not be regarded as having drawn on funds, so as to be entitled to notice. But this was probably on the ground that the drawer had no right under such circumstances to expect his bill to be honored; for in *Williams v. Brashear*, 19 La. 370, the doctrine of the principal case is held; and such was declared to be the law of Louisiana in *Bloodgood v. Hawthorn*, 9 La. 124. See also *Whaley v. Houston*, 12 La. An. 585; *LaCoste v. Harper*, 3 La. An. 385.

The fact of the indebtedness of the acceptor to the drawer will warrant the drawing, though the acceptor have no funds of the drawer in his hands. *Walker v. Rogers*, 40 Ill. 278; *Thackray v. Blackett*, 3 Camp. 164.

The authorities are not uniform upon the point which was before the Court in the principal case, and which Chief Justice *Marshall* forcibly said (p. 439), was "more perplexing than convincing;" viz., in regard to the amount of funds in the hands of the drawee which will justify the drawing. In the *Matter of Brown*, 2 Story, 502, the same doctrine is maintained by *Story, J.* as that held in the principal case. See also — *v. Stanton*, 1 Hay. 271; *Blackenship v. Rogers*, 10 Ind. 333; *Smith v. Thatcher*, 4 Barn. & Ald. 200; *Wollenweber v. Ketterlinus*, 17 Penn. State, 389, 399; *Hill v. Norris*, 2 Stew. & P. 114; *Sutcliffe v. McDowell*, 2 Nott & M. 251; *LaCoste v. Harper*, 3 La. An. 385.

The difficulty of laying down any inflexible rule in dollars and cents to meet this particular phase of the case is apparent; and it results only in confusion to attempt it. It should suffice that the cases of this character may be decided upon the broad and just principle determined by Chief Justice *Marshall*, that the mat-

ter of notice should depend upon the question whether the drawer had reasonable ground to expect his bill to be honored. The question of *amount* may furnish a *prima facie* presumption; but it can never be conclusive of the drawer's right to draw. There may have been a private agreement or understanding upon the subject; or there may have been other circumstances which justified the drawing, though the drawer had no funds at all in the hands of the drawee.

It has been held not to affect the question of the necessity of notice in this class of cases, that the bill had been accepted. Notwithstanding the fact of acceptance, the drawer is not entitled to notice of non-payment, if he had no right to draw. *Hoffman v. Smith*, 1 Caines, 160; *Hill v. Norris*, 2 S. & P. 114; *Foard v. Womack*, 2 Ala. 368, 371; *Gillespie v. Cammack*, 3 La. An. 248; *Kinsley v. Robinson*, 21 Pick. 327; *Mobley v. Clark*, 28 Barb. 390; *Valk v. Simmons*, 4 Mason, 113; *Allen v. King*, 4 McLean, 128; *Rhett v. Poe*, 2 How. 457. And see *Sargent v. Appleton*, 6 Mass. 85.

But a contrary view has been entertained. See *Pons v. Kelly*, 2 Hay. 45, 47; *Richie v. McCoy*, 13 Sm. & M. 541. See also *Campbell v. Pettingill*, 7 Greenl. 126; *English v. Wall*, 12 Rob. La. 132; *Orcar v. McDonald*, 9 Gill, 350, 358.

The cases also show that, though the drawer may have had funds in the hands of the drawee, and therefore ground to draw, still, if he withdraw the funds before the bill matures, or having funds on the way intercept them so that they do not reach the drawee, notice of non-payment is excused. *Valk v. Simmons*, 4 Mason, 113; *Rhett v. Poe*, 2 How. 457; *Adams v. Darby*, 28 Mo. 162; *Eicheberger v. Finley*, 7 Harris & J. 381, 385; *Spangler v. McDaniel*, 3 Ind. 275; *Hammond v. Dufrene*, 3 Camp. 145. But see *Orr v. Maginnis*, 7 East, 359.

But none of the circumstances above mentioned will excuse notice to an indorser. He has no concern with the state of accounts between the drawer and drawee, and should be notified of the dishonor. *Wilkes v. Jacks*, Peake, 202, per Lord *Kenyon*; *Byles, Bills*, 293, 10th Lond. ed. See *Carter v. Flower*, 16 Mees. & W. 743, 751.

As to what particular circumstances come within the rule respecting reasonable ground, see the numerous cases collected in 1 *Parsons, Notes and Bills*, 532, *et seq.*

In the case of paper payable at bank it is sufficient presentment, demand, and refusal of payment that it was in the banking-house on the day it fell due, and that there were no funds of the payor there, and no provision for payment. *Hollowell v. Curry*, 41 Penn. State, 322; *Bailey v. Porter*, 14 Mees. & W. 44; *United States Bank v. Smith*, 11 Wheat. 171; *Fullerton v. Bank of the United States*, 1 Peters, 604, 617; *Bank of the United States v. Carneal*, 2 Peters, 604. But notice must still be given. *Phipps v. Chase*, 6 Met. 492, and cases just cited.

Respecting the effect of war upon the obligation of the holder to make presentment and give notice, the recent case of *House v. Adams*, 48 Penn. State, 261, growing out of the late war, is interesting and important. The facts will sufficiently appear in the opinion by

READ, J. Presentment for acceptance is not necessary in the case of a bill of exchange, payable at a certain period after date, and in Pennsylvania the drawer is not discharged for want of notice of non-acceptance, provided he receives notice of

non-payment. *Read v. Adams*, 6 Serg. & Rawle, 356. The question therefore in the present case narrows itself down to whether due notice was given of the non-payment of the two bills of exchange which are the subject of this suit.

The first bill was for \$112, and was protested at New Orleans for non-payment on the 11th June, 1861. The second bill for \$351 25, was protested at the same place for non-payment, on the 29th July, 1861. Notice of non-payment was not received by the holders of these bills at Pittsburgh until 14th July, 1862, when the protests and drafts were received by them by mail, and proper notice of their dishonor was given to the indorser and drawers. According to strict commercial law in ordinary cases this notice came too late, but the state of the country is alleged as an excuse, and it therefore becomes necessary to determine the rule in such cases, and its applicability to the history of the times, and the facts disclosed on the trial.

Judge *Story*, in his *Commentaries on the Law of Promissory Notes*, § 257, has enumerated, among the sufficient excuses for non-presentment and demand at the time and place when and where the promissory note is due and payable, the following: “(3.) The presence of political circumstances amounting to a virtual interruption and obstruction of the ordinary negotiations of trade, called the *vis major*. (4.) The breaking out of war between the country of the maker and that of the holder. (5.) The occupation of the country where the parties live, or where the note is payable by a public enemy, which suspends commercial intercourse. (6.) Public and positive interdictions and prohibitions of the State which obstruct or suspend commerce and intercourse.” And in § 356 of the same work, the learned commentator enumerates them also as constituting sufficient excuses for the omission of due and regular notice of the dishonor.

Upon this subject there are two leading cases: one in England, and one in America. In *Patience v. Townley*, 2 Smith, 224 (1805), which was an action on a bill of exchange by the holder against one of the antecedent parties, the bill was drawn the 1st June, 1800, at three months’ usance on Leghorn, and was due on the 10th September, 1800, but was not presented either for acceptance or payment until the 31st October, 1800. The protest stated that it was not paid because not presented in due time. At the trial, before Lord *Ellenborough*, C. J., this was relied upon as a defence to the action, but the plaintiff proved that, from the particular situation of the country, Leghorn being then occupied by the enemy, or in some such critical situation, though the bill was sent out by the plaintiff for the purpose of being presented, it was impossible to present it in due time, and it was presented as early as could be afterwards, and there was a verdict for the plaintiff. This was affirmed by the Court of King’s Bench, on a motion for a new trial by Mr. *Erskine*, on a technical ground not disputing the ruling at *nisi prius*, where Lord *Ellenborough* said: “It was left to the jury to say whether, from the situation of the country, it was possible for the plaintiff to present it in due time.”

In *Hopkirk v. Page*, 2 Brock, 20 [the principal case], a case growing out of our revolutionary war, Chief Justice *Marshall*, p. 34, uses this language: “The second bill was drawn on the twenty-sixth day of November, 1775, for £246 3s. 7d., and was protested on the twenty-sixth day of June, 1776. It was drawn after the commencement of hostilities in Virginia, and before it was protested all intercourse between the two countries was interdicted. Under these circumstances

notice is not to be expected, and ought not to be required. I at first doubted whether a bill which, for a length of time is held under circumstances which dispense with notice, does not lose its commercial character, and become an ordinary debt. But on reflection I am satisfied that this idea cannot be sustained, and that to charge the drawer, notice of the dishonor of his bill ought to be given within a reasonable time after the removal of the impediment."

To apply these principles to the present case, it is necessary briefly to refer to the history of the times. On the 20th December, 1860, South Carolina passed a secession ordinance, which example was followed by Mississippi, Alabama, Florida, Georgia, and on the 26th January, 1861, by Louisiana, whose State authorities immediately seized the United States branch mint and the custom-house at New Orleans, with the Government funds amounting to more than \$500,000, and the United States revenue cutter Robert McClelland was traitorously surrendered by Captain Breshwood to the State of Louisiana. On the 1st February, Texas seceded, and on the ninth of the same month the rebel Congress at Montgomery elected Jefferson Davis President of the Confederate States of America, and on the 11th March the Constitution of the Confederate States was unanimously adopted. On the 12th April, Fort Sumter was bombarded, and on the 14th capitulated, and on the 21st May the rebel Congress adjourned to meet at Richmond on the 20th July, where their meetings have since been held.

On the 19th April, the President issued his proclamation establishing a blockade of the ports of the seceded States above stated, which, on the 27th of the same month was extended to the ports of the States of Virginia and North Carolina. On the 3d May a proclamation was issued, calling for three years' volunteers, and increasing the regular army and navy, and on the 10th May martial law was declared on certain islands on the coast of Florida. On the 26th August, the President, in pursuance of the Act of Congress of 13th July, 1861, declared the inhabitants of these States in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof and the citizens of other States and other parts of the United States is unlawful, and will remain unlawful until such insurrection shall cease or have been suppressed. On the 12th May, 1861, the President by his proclamation declared that the blockade of the ports of Beaufort, Port Royal, and New Orleans should so far cease and determine from and after the first day of June next, that commercial intercourse with these ports, except as to persons, things, and information contraband of war, may from that time be carried on, subject to the laws of the United States, and to the limitations and in pursuance of the regulations prescribed by the Secretary of the Treasury, in his order appended to the proclamation. On the 1st July, 1862, in pursuance of the second section of an Act of Congress of 7th June, 1862, the President by his proclamation declared that certain States, including Louisiana, were then in insurrection and rebellion, and the civil authority of the United States so obstructed that the provisions of the Act of 5th August, 1861, could not be peaceably executed; that the taxes upon real estate under the Act aforesaid, within said States, with a penalty of fifty per centum of said taxes, should be a lien upon the same till paid.

Flag-officer Farragut having run past Forts Jackson and St. Philip, New Orleans was surrendered on the 28th April, 1862, and the American flag was hoisted on the custom-house, post-office, mint, and city hall, and the forts were also

surrendered that evening. In the report of the postmaster-general of the 2d December, 1861 (Message and Documents 1861-2, part 3, p. 558), he says: "In consequence of the defection of the insurrectionary States, and the termination of the mail service in those States, on the 31st May last, under the Act of Congress approved Feb. 28, 1861 (with the exception of service in Western Virginia), it becomes necessary to present the transportation statistics in two divisions; these are shown in Tables A and B attached to the report." Table B, at page 602, is headed "Table of Mail Service in the following States" (including Louisiana), "as it stood on the 31st May, 1861, discontinued under Act of Congress, approved Feb. 28, 1861."

By the evidence it appears that the Farmers' Deposit Banking Company, with whom these drafts were left by the plaintiff for collection about 1st May, 1861, returned them, declining to collect them on account of the irregularity of the mails. They were then immediately transmitted by the plaintiffs to Burbridge & Co., their agents at New Orleans.

It also appeared by the evidence of the postmaster at Pittsburgh, that all postal service in Louisiana and other named places was suspended on and after 31st May, 1861. On the 26th May, 1862, the first mail went out to New Orleans carrying ten thousand letters, including the letters which had accumulated in the dead-letter office. This mail was carried by the steamer Blackstone; since then the regular route to New Orleans has been by New York. This cause was tried on the 9th December, 1862, and the testimony, of course, is to be taken as delivered at that time.

"The first mail from New Orleans was an enormous one. We received ours from it about the 1st July, 1862," says the postmaster at Pittsburgh. "There were considerable intervals between the reception of the first mails after resumption."

The omission of due and regular notice of the dishonor of these bills is therefore satisfactorily accounted for by the entire cessation of all mails and commercial intercourse with New Orleans, a blockaded port, and the only question is, whether such notice was given within a reasonable time after the removal of the impediment. It will be recollected that the only communication between Pittsburgh and New Orleans was by sea through the port of New York, and that the very first mail received was about the 1st July. Under these circumstances particularly, as connected with the unsettled state of affairs at New Orleans, although in our possession, we cannot say the notice received at Pittsburgh on the 14th July, was not within a reasonable time after the removal of the impediment.

The judgment of the Court must therefore be reversed, and judgment entered on the verdict in favor of the plaintiffs.

See also *Apperson v. Union Bank*, 4 Cold. 445; *Polk v. Spinks*, 5 Cold. 431.

GEORGE McGRUDER, Plaintiff in Error, v. THE PRESIDENT,
DIRECTORS, &C., OF THE BANK OF WASHINGTON, Defendants in Error.

(9 Wheaton, 598. Supreme Court of the United States, February, 1824.)

Removal into another jurisdiction. — The removal of the maker of a note, before its maturity, into another jurisdiction from that in which the note was executed, will excuse the holder from making a personal presentment and demand.

THE case is stated in the opinion of the Court.

JOHNSON, J. This case comes up from the Circuit Court of the District of Columbia, in which a suit was instituted against the plaintiff here, as indorser of one Patrick M'Gruder.

The facts are exhibited in a stated case, upon which, by consent, an alternative judgment is to be entered. The judgment below was for the plaintiffs in the action, and the defendant brings this writ of error to have that judgment reversed, and a judgment entered in his favor.

The leading facts in the cause are so much identified with those in the case of *Renner v. The Bank of Columbia*, 9 Wheat. 581,¹ decided at the present term, on the question relative to the days of grace, that the decision in that cause disposes of the principal question raised in this.

But there is another point presented in the present cause. There was no actual demand made on the drawer of this note, and the question intended to be presented was, whether the facts stated will excuse it.

At the time of drawing the note, and until within ten days of its falling due, the maker was a house-keeper in the District of Columbia. But he then removed to the State of Maryland, to a place within about nine miles of the district. The case admits that neither the holder of the note, nor the notary, knew of his removal or place of residence; but the circumstances of his removal had nothing in them to sanction its being construed into an act of absconding. The words of the admission to this point are, that he "went to the house where the said Patrick had last resided, and

¹ *Ante*, 297.

from which he had removed as aforesaid, in order there to present the said note, and demand payment of the same; and not finding him there, and being ignorant of his place of residence, returned the said note under protest."

The alternative in which the judgment of the Court is to be rendered is not very appropriately stated; but since the absurdity cannot have entered into the minds of the parties, that, not knowing of the removal or present abode of the drawer, the holder was still bound to follow him into Maryland, we will construe the submission with reference to the facts admitted; and then the question raised is, —

Whether the holder had done all that he was bound to do, to excuse a personal demand upon the maker.

On this subject the law is clear; a demand on the maker is, in general, indispensable; and that demand must be made at his place of abode or place of business. That it should be strictly personal, in the language of the submission, is not required; it is enough if it is at his place of abode, or generally, at the place where he ought to be found. But his actual removal is here a fact in the case, and in this, as well as every other case, it is incumbent upon the indorsee, to show due diligence. Now, that the notary should not have found the maker at his late residence was the necessary consequence of his removal, and is entirely consistent with the supposition of his not having made any one of those inquiries which would have led to a development of the cause why he did not find him there. *Non constat*, but he may have removed to the next door, and the first question would, most probably, have extracted information that would have put him on further inquiry. Had the house been shut up, he might, with equal correctness, have returned "that he had not found him," and yet that clearly would not have excused the demand, unless followed by reasonable inquiries.

The party must, then, be considered as lying under the same obligations as if, having made inquiry, he had ascertained that the maker had removed to a distance of nine miles, and into another jurisdiction. This is the utmost his inquiries could have extracted, and marks, of course, the outlines of his legal duties.

Mere distance is, in itself, no excuse from demand; but, in general, the indorser takes upon himself the inconvenience resulting from that cause. Nor is the benefit of the post-office allowed him, as in the case of notice to the indorser.

But the question on the recent removal into another jurisdiction, is a new one, and one of some nicety. In case of original residence in a State different from that of the indorser, at the time of taking the paper, there can be no question; but how far, in case of subsequent and recent removal to another State, the holder shall be required to pursue the maker, is a question not without its difficulties.

We think that reason and convenience are in favor of sustaining the doctrine, that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law, than their abstract justice. On this point there is no other rule that can be laid down, which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the indorser should stand committed, in this respect, by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held, in England, to stand committed; and, although from the contiguity, and, in some instances, reduced size of the States, and their union under the general government, the analogy is not perfect, yet it is obvious that a removal from the seaboard to the frontier States, or *vice versa*, would be attended with all the hardships to a holder, especially one of the same State with the maker, that could result from crossing the British Channel.

With this view of the subject, we are of opinion that the judgment below, although rendered on a different ground, must be sustained.

Judgment affirmed.

The doctrine of the above case is well settled. See *Taylor v. Snyder*, *ante*, p. 327, and note; *Adams v. Leland*, 30 N. Y. 309; *Foster v. Julien*, 24 N. Y. 28. But the question whether, in case of removal into another jurisdiction, presentment should be made at the payor's last abode, has given rise to some conflict. It will be observed that that point is not directly decided in the principal case; it is only held that such a presentment is *sufficient*. If no such presentment had been made, the question of the necessity of it might have arisen.

In Massachusetts it is held that in case of removal from the State, the presentment should be made at the payor's last place of residence. *Wheeler v. Field*, 6 Met. 290. See also *Pierce v. Cate*, 12 Cush. 190, cited at length in note to *Lehman v. Jones*, *post*, 451. In New York and Ohio the contrary rule obtains. *Foster v. Julien*, 24 N. Y. (10 Smith) 28, *Mason, J.*, dissenting; *Gist v. Lybrand*, 3 Ohio, 308. The same may possibly be inferred in Pennsylvania from *Reid v. Morrison*, 2 Watts & S. 401, where it is said that the rule which applies in the case of an absconding debtor applies equally in the case of the removal of the payor into

another State. This may mean, however, only that a personal demand is in such case dispensed with; for it is very obvious that so far as the necessity of making presentment at the payor's last abode is concerned, there is a very material difference between an absconding and an honest removal from the State. In the latter case it is not unusual for the maker or acceptor to leave funds behind him to meet his obligations; but a circumstance of that kind in the former case would be remarkable indeed. And this seems to be a strong reason for maintaining the rule held in Massachusetts. Chancellor *Kent* (3 Com. 96), and *Beardsley, J.*, in *Taylor v. Snyder, ante*, p. 327, carefully state that presentment at the payor's last abode is *sufficient*; but say nothing of the necessity of such presentment. See *Taylor v. Snyder, ante*, p. 327, and latter part of note; also *Lehman v. Jones, infra*.

LEHMAN *v.* JONES.

(1 Watts & Sergeant, 126. Supreme Court of Pennsylvania, May, 1841.)

Absconding of the payor.—If the maker of a promissory note absconds before the maturity of the note, this will excuse the holder from making presentment at his last place of residence.

ASSUMPSIT against Lehman and Stroh, as indorsers of a promissory note.

It was proved that Robinson, the maker of the note in suit, had absconded to parts unknown and had not returned.

The objection was that no demand was made upon Robinson, and that the notice was informal.

The Court below thus instructed the jury:—

PARSONS, PRESIDENT.—The Court instruct the jury, as a matter of law, if they believe that Robinson absconded in December, 1835, as testified to by his mother, and did not return before the note became due, nor since, it was not requisite that the holders of the note should go to Jonestown, and attempt to make a demand upon him in order to charge the indorsers; provided the indorsers were cognizant of the fact that the drawers had left the State, of which there would seem to be no doubt, if the testimony of Mrs. Robinson is believed.

*Per Curiam.*¹—The rule in *Lambert v. Oakes* (1 Ld. Raym. 443), is, that the holder must have demanded, or done his en-

¹ GIBSON, C. J., ROGERS, HUSTON, KENNEDY, SERGEANT, JJ.

deavor to demand the money. But the law is not so unreasonable as to require an impossibility ; and therefore it is said (1b. Anon. 743), that where the drawee of a bill has absconded before the day of payment, notice of the fact is equivalent to notice of demand and dishonor. In *Duncan v. McCullough*, 4 Serg. & Rawle, 480, the principle was recognized as being applicable to a promissory note ; and it has been established by direct decision in some of our neighboring States. It would have been idle for the plaintiff to demand payment at the late residence of Robinson, the drawer, after he had absconded. Where, indeed, the drawer of a note or the drawee of a bill has merely removed from the place of his residence, indicated by the bill, it is the business of the holder to inquire for him and ascertain where he has gone, in order that he may follow him ; but when he has secretly fled, an application at the place would lead to no information in respect to him : and the law requires nothing which is nugatory. The other errors are either resolvable by this precedent, or are plainly unfounded.

Judgment affirmed.

This case is followed by *Reid v. Morrison*, 2 Watts & S. 401 ; and the same doctrine is stated to be the law in New York. See *Taylor v. Snyder*, *ante*, p. 327 ; *Spies v. Gilmore*, 1 Comst. 321. See also *Wolfe v. Jewett*, 10 La. 383, stating the same rule ; *Bruce v. Lytle*, 13 Barb. 163 ; *Gillespie v. Hannahan*, 1 McCord, 503, in which *Johnson, J.*, says : “ Now I take it that there is nothing in the principles of justice which would require the indorsee to make a demand, when, as in the case of *Putnam v. Sullivan*, 4 Mass. 53, it had become impracticable, the maker having absconded. Nor can I perceive in what way it would promote commerce. But on the contrary, that rule which enjoined the performance of impossibilities, would deter the most hardy and adventurous from placing themselves within its operation. And it seems to be generally agreed that the absconding of the maker of a note, or the acceptor of a bill of exchange, will excuse the holder from making a demand.”

This was the doctrine in Massachusetts until the case of *Pierce v. Cate*, 12 Cush. 190, decided in 1853, when a more stringent rule was declared. See *Grafton Bank v. Cox*, 13 Gray, 503. See as to the former rule, *Hale v. Burr*, 12 Mass. 85 ; *Shaw v. Reed*, 12 Pick. 132. But in *Pierce v. Cate*, *supra*, it was held that if the payor absconds, leaving no visible property subject to attachment, a want of demand or *inquiry* for him will not thereby be excused, though the indorser knew of the absconding. *Shaw, C. J.*, said : “ We are aware that in some of the earlier cases in Massachusetts, it was held that proof that the maker had absconded, or failed, and become insolvent, so that a demand would be unavailing, would be an excuse for want of presentment. *Putnam v. Sullivan*, 1 Mass. 15. But it has been decided, on consideration, and upon principle, that the obligation of an indorser is conditional ; that is, that he will be answerable if,

at the maturity of the note, the holder will present it to the maker for payment; and if thereupon the maker shall neglect or refuse to pay it, and the holder will give seasonable notice to the indorser, he will pay it himself. *Sandford v. Dillaway*, 10 Mass. 52; *Farnum v. Fowle*, 12 Mass. 89. These are the conditions of his liability. The holder, therefore, to charge the indorser, must show a compliance with these conditions, or that proper means have been taken to effect a compliance with them, unless, indeed, he can prove a waiver of them by the indorser. And this, we think, is the rule as now settled. *Granite Bank v. Ayres*, 16 Pick. 392; *Lee Bank v. Spencer*, 6 Met. 308. If the maker has left the State, the holder must demand payment at his actual or last place of abode, or of business, within the State. *Wheeler v. Field*, 6 Met. 290." But, after giving the same extract from this case in 1 *Parsons, Notes and Bills*, 450, it is there said, in the note: "It is a fact personally known to us, that this point was not argued, nor indeed raised, by counsel in this case. The defence was based upon other grounds, because it was supposed that the decisions overruled by this case, and the practice under them, had established the law."

Under these circumstances, it would not be strange that the old rule, as stated in the principal case should, on the next raising of the question, be re-established.

But though demand upon the maker or acceptor is excused in the case of an absconding, still notice should be given that the party has absconded. *Anonymous*, 1 *Ld. Raym.* 743; *Foster v. Julien*, 24 *N. Y.* (10 *Smith*) 28, 37; *Ex parte Rohde*, *Mont. & M.* 430; *Michand v. Lagarde*, 4 *Minn.* 43; 1 *Parsons, Notes and Bills*, 449, 528.

MICAJAH T. WILLIAMS, Plaintiff in Error, v. THE BANK OF THE UNITED STATES, Defendant in Error.

(2 *Peters*, 96. Supreme Court of the United States, January, 1829.)

Absence of payor. — In an action against an indorser, it appeared that the notary called at his dwelling-house to serve notice of dishonor, and found the house shut up, the doors locked, and the family out of town (as he learned on inquiry of the next neighbor), upon a visit of unknown duration. *Held*, that he had used due diligence, and that the indorser was liable.

THE case is stated in the opinion of the Court.

WASHINGTON, J. This was an action of assumpsit, brought in the Circuit Court of Ohio by the president, directors, and company of the Bank of the United States, against J. Embree, the maker, and D. Embree and M. T. Williams, the indorsers of two several promissory notes. The only count in the declaration is for money lent and advanced by the plaintiffs to the defendants.

Upon the plea of the general issue, the case at the trial was, by consent of the parties, submitted to the Court; and the above notes were given in evidence by the plaintiffs, in support of the action. The Court gave judgment against the defendants, and ordered it to be certified in pursuance to the statute of Ohio, that it appeared to the satisfaction of the Court that J. Embree had signed the notes on which the suit was brought as principal, and D. Embree and M. T. Williams, as sureties.

At the trial of the cause thus submitted to the Court, the plaintiffs, having proved the demand and the handwriting of the indorsers of the notes, offered the following evidence of the notice to the defendant, Williams, namely, "that the notary public, after the protest of the notes and the expiration of the usual days of grace, called at the house of the defendant Williams, who resided in the city of Cincinnati, which he found shut up, and the door locked, and on inquiry of the nearest resident, he was informed that the said Williams and family had left town on a visit, whether for a day, week, or month, he did not know, nor did he inquire. He made use of no further diligence to ascertain where Mr. Williams had gone, or whether he had left any person in town to attend to his business. The witness left a notice at the house of a person adjoining, with a request to hand it to the defendant when he should return."

The Court being of opinion that this evidence was conclusive of legal notice to charge Williams, his counsel took a bill of exceptions, and the cause is now for judgment before this Court upon a writ of error.

The only question which this bill of exception presents is, whether due diligence was used by the defendants in error to give notice to the indorser of the non-payment of these notes by the maker of them?

The general rule of law applicable to the subject has long been settled, that to enable the holder of a bill of exchange or promissory note to charge the indorser, it is incumbent on him to prove that timely notice of the dishonor of the bill or of the non-payment of the note was given to the indorser, or, if this could not be done, he must excuse the omission by showing that due diligence had been used to give such notice.

If the parties reside in the same city or town, the indorser must be personally noticed of the dishonor of the bill or note, either

verbally or in writing; or a written notice must be left at his dwelling-house or place of business. Either mode is sufficient, but one or the other must be observed unless it is prevented by the act of the party entitled to the notice.

In the case now under consideration, the banking-house of the defendants in error and the dwelling-house of the plaintiff were located in the same city. The notary called at the plaintiff's house, which he found shut up, and the door locked. Upon inquiry of the nearest resident, he was informed that the defendant, with his family, had left town on a visit, but for how long a period was unknown to this person; no further attempt was made to ascertain where the plaintiff in error was gone, or whether he had left any person in town to attend to his business. The question to be decided is, whether, under these circumstances, the defendants are excused for not having given the notice which the law requires?

In the case of *Goldsmith and Bland, Bayley, Bills, 224*, note, it was decided that it was sufficient to send a verbal notice to the defendant's counting-house, and if no person be there in the ordinary hours of business to receive it, it is not necessary to leave or send a written one. The principle of this decision is, that the counting-house of the defendant is the place in which the holder was entitled, during the regular hours of business, to look for the person for whom the notice was intended, or for some person authorized by him to receive it, and that the omission to give it was occasioned, not by the want of due diligence in the holder, but by the fault of the party who claimed a right to receive it.

The principle here stated is not peculiar to this class of contracts. If a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition.

Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the non-performance of the condition as a bar to the responsibility which his part of the contract had imposed upon him.

The application of this general principle of law to the subject

before us, may be illustrated by other cases than the one immediately under consideration. The holder of a bill or promissory note, in order to entitle himself to call upon the drawer or indorser, must give notice of its dishonor to the party whom he means to charge. But if, when the notice should be given, the party entitled to it be absent from the State, and has left no known agent to receive it; if he abscond, or has no place of residence which reasonable diligence used by the holder can enable him to discover, the law dispenses with the necessity of giving regular notice.

So where the parties, as in this case, reside in the same city or town, the notice should be given at the dwelling-house or place of business of the party entitled to claim it, and the duty of the holder does not require of him to give the notice at any other place. If the giving of the notice at either of these places be prevented by the act of the party entitled to receive it, the performance of the condition is excused.

In this case, the notary called at the dwelling-house of the indorser, at the regular time and at a seasonable hour, for aught that appears, to serve the notice, and found the house shut up, the doors locked, and the family absent from town upon a visit of unknown duration to the agent of the bank or to his informer. What was he to do? He was not bound to call a second time, nor was he under any obligation to leave a written notice, even if he could have found an entrance into the house.

But it is insisted that the defendants in error were bound, under the circumstances of this case, to give notice to the plaintiff through the channel of the post-office; and the case of *Ogden v. Cowley*, 2 Johns. 274, is relied upon in support of this position.

In that case, the notary called at the houses of the indorser, and of his deceased partner, for the purpose of giving them notice of the non-payment of the note, but found their house locked up, and on inquiring at the next door was told they were gone out of town. On the same day, the notary put a letter into the post-office in the city of New York, addressed to the defendant and his partner, informing them of the non-payment of the note, and that they were looked to for payment. It appeared that at that time the yellow fever prevailed in the city. The Court decided that all proper steps were taken to communicate the requisite notice to the indorser, and that the notice was, of course, sufficient.

It may be remarked upon this case, that the absence of the

indorsers from their houses was probably the consequence of a temporary removal from the city, on account of the prevailing sickness, and that the case does not inform us whether the place to which they had removed was known to the notary. We are not prepared to say that in such a case the parties entitled to notice were bound to be at their dwelling-houses, or to have any person there at the time the notary called to receive notice, and consequently that their absence, and the closing of their houses, ought to have excused the holder from taking other steps to communicate notice to them. But laying these circumstances out of the case, the Court decided no more than that the steps taken to give notice were sufficient, in point of law, for that purpose; and it is not to be doubted but that they were so. They do not decide that, in a case freed from the circumstances before noticed, it was necessary that notice to the indorsers should have been given through the post-office.

In the case of *Crosse v. Smith*, 1 Maule & Sel. 545, the cashier called at the counting-house of the drawer, for the purpose of giving him notice of the dishonor of the bill. He found the outward door open, but the inner locked. The cashier knocked, and made noise enough to have been heard, if anybody had been within. After waiting a few minutes and no person appearing, he left the house, and took no further legal step to give the notice. It was insisted, in opposition to the sufficiency of the notice, that a notice in writing, left at the counting-house, or put into the post-office, was necessary. The answer given by the Court was, that the law did not require either mode to be pursued. "Putting a letter in the post," says Lord *Ellenborough*, "is only one mode of giving notice; but where both parties are residing in the same post-town, sending a clerk is a more regular and less exceptionable mode." The decision in this case, as to the sufficiency of the notice, was the same as that given in the case of *Goldsmith v. Bland*, before referred to.

The case of *Ireland v. Kip*, 10 Johns. 490, and 11 Johns. 231, was much pressed upon the Court in the argument of the present cause by the counsel for the plaintiff in error. We have examined that case with great attention and respect, but have not been able to view it in the same light as it seemed to have struck the learned counsel. The place of residence of the defendant, the indorser, was three and a half miles from the post-office, within the limits

of the city of New York, but without the compact part of the city, and without the district of any letter-carrier. The case does not state that the indorser had any counting-house, or place of business in the city, at which the notice could have been left. The only notice given to the defendant was a written one, put into the post-office in the city of New York, directed to the defendant, and stating that the note had not been paid. The place of the defendant's residence was known to the clerk of the notary, who put the written notice to the defendant into the post-office. The only question decided by the Court was, that, under the circumstances of that case, the holder of the note was bound to give personal notice to the defendant, or to see that the notice reached his dwelling-house; and that merely putting the notice into the post-office was not sufficient.

Upon a second trial of the cause it appeared in evidence, that the defendant had given directions to the letter-carriers of the post-office to leave all letters that came to the post-office for him at a house in Frankfort Street, in the city of New York: that the letter-carriers called at the post-office three or four times every day, and took out and delivered all letters left there; and that the defendant usually called or sent every day for his letters to the house in Frankfort Street.

The learned judge who delivered the opinion of the Court stated, that, admitting a service of the notice at the house in Frankfort Street would have been good and equivalent to a service at the defendant's dwelling or counting-house; still, the delivery of the notice at the post-office, unaccompanied with proof that it was actually delivered at the house, was not notice. He adds, that "the invariable rule with us is, that when the parties reside in the same city or place, notice of the dishonor of bills or notes must be personal, or something tantamount; such as leaving it at the dwelling-house or place of business of the party, if absent." Now it is apparent, that the question which arises in the case under consideration was not and could not be decided in the case just referred to. The objection to the notice in the latter case was, that it ought to have been given at the dwelling-house of the defendant, and could not be given through the post-office, unless it also appeared that the notice so given reached the dwelling-house or the house in Frankfort Street. No attempt was made to give the notice in the former mode, as was done in this case; and the

latter mode, so far from being considered as tantamount to the former, or as being necessary in order to excuse the want of personal notice, is declared throughout to be insufficient without further proof.

The opinion of this Court is that the defendants in error were, under the circumstances of this case, excused from taking any other steps than they did, to give notice to the plaintiff of the non-payment of these notes; and that the judgment of the Court below ought to be affirmed, with costs.

The text-writers state the rule as declared in this case. See Story, Promissory Notes, § 238; Story, Bills of Exchange, § 352; Chitty, Bills, 279, 280; Bayley, Bills, 216, 6th Lond. ed.

But if the payor's place of business or residence is closed, the holder as in the principal case, must make inquiry for him. *Collins v. Butler*, 2 Strange, 1087; *Bateman v. Joseph*, 12 East, 433; *Beveridge v. Burgis*, 3 Camp. 262; *Browning v. Kimear*, 1 Gow, 81; *Hine v. Allely*, 4 Barn. & Adol. 624; *Granite Bank v. Ayres*, 16 Pick. 392; *Lanusse v. Massicot*, 3 Mart. La. 261, 265; *Franklin v. Verbois*, 6 La. 727. *Howe v. Bowes*, 16 East, 112; s. c., in error, 5 Taunt. 30; *Baumgardner v. Reeves*, 35 Penn. State, 250; *Shedd v. Brett*, 1 Pick. 413. In the last-named case, *Parsons*, C. J., seemed to think the inquiry unnecessary, though there was proof of diligent search for the maker in the case.

BARTON v. BAKER.

(1 Sergeant & Rawle, 334. Supreme Court of Pennsylvania, April, 1815.)

Insolvency. Assignment to indorser. — Though the maker of a note was insolvent when the note was made and indorsed, and also when it fell due, and this fact was known to the indorser, this will not excuse due notice of non-payment. But if the indorser has received from the maker a general assignment of his estate and effects, notice is not necessary.

THE case is sufficiently stated in the opinion of the Court.

TILGHMAN, C. J. The objection to the verdict in this case is, that due notice of non-payment by the maker of the note on which the action is founded, was not given to the defendant who was the indorser. It is confessed that due notice was not given; but the plaintiff contends, that under the circumstances of the case, notice was not necessary. The circumstance principally relied on at the

trial, and on which the plaintiff had the charge of the Court in his favor, is, that at the time when the note was made and indorsed, and also at the time when it fell due, it was known to the defendant that James Brown & Co. were insolvent. If the case rested solely on this objection, I should be for granting a new trial, because the cases cited by the plaintiff, of *De Berdt v. Atkinson*, 2 H. Bl. 336, and *Corney v. Da Costa*, 1 Esp. 302, have been overruled in *Nicholson v. Gouthit*, 2 H. Bl. 609, and *Esdaile v. Sowerby*, 11 East, 114. The case of *Jackson v. Richards*, 2 Caines, 343, agrees with the law as settled by the last English cases. But I do not rest my opinion solely upon the authority of these cases. The reason of the thing demonstrates that the insolvency of the maker of a note, though known to the indorser, ought not to discharge the holder from giving notice. There are various degrees of insolvency, and it rarely happens that a man is totally insolvent. So that there is a chance of getting something by an application to the debtor. Besides, if a man has nothing of his own he may have friends, who, to relieve him from pressure, will do something for him. The indorser, therefore, has a chance of securing himself at least in part. The only reason that can be assigned for insolvency taking away the necessity of notice, is, that notice could be of no use to the indorser. But it is almost impossible to prove that it might not have been of use. Therefore it is necessary. There is another circumstance in this case, however, operating powerfully in favor of the plaintiff. The house of James Brown & Co. consisted of James Brown and Armat Brown. When the note fell due, James Brown was in Europe, and Armat Brown in this city. A few months before it was due the defendant received from Armat Brown an assignment of *his whole estate*, for the purpose, among other things, of indemnifying him against his indorsements on account of James Brown & Co. Now, by the taking of this assignment, it is not unreasonable to presume, that the defendant took upon himself the payment of the indorsed notes, especially as when he did receive notice (ten days after the note fell due), although he *knew* and *remarked*, that it was out of time, he did not deny his responsibility, but said that his ability to pay would depend on the arrival of a vessel. I agree, therefore, with *Bond v. Farnham*, 5 Mass. 170, where it was held, that in such a case the indorser dispenses with notice. Inasmuch then as it appears upon the whole of

this case, that notice of non-payment was not necessary, no injustice has been done by the verdict, and therefore, a new trial ought not to be granted.

YEATES, J. I have no hesitation in admitting, that my charge to the jury in the particular of notice to the defendant of the non-payment of the note by the drawers, does not accord with the most modern authorities. I considered the cases *De Berdt v. Atkinson*, in 1794, 2 H. Bl. 336, and of *Corney v. Da Costa* in 1795, 1 Esp. 302, under circumstances very similar to those disclosed in evidence on the trial, as decisive of the question of notice; and that, according to the expressions of *Buller, J.*, in the first case, the general rule as to notice was only applicable to fair transactions, where the note had been given for value, in the ordinary course of trade. The justice of the case in favor of the plaintiff struck my mind forcibly, and I thought *Nicholson v. Gouthit*, in 1796, 2 H. Bl. 610, and *Jackson v. Ritter*, in 1805, 2 Caines, 343, might be admitted to be law, without overthrowing the two former decisions. In the first of them, 2 H. Bl. 610, it is stated, that if the note had been presented when it became due, it would have been paid, as *Burton*, a prior indorser, had lodged a sufficient sum of money in the defendant's hands for that purpose, but which he paid away, when he found the note did not come to him as he expected. It appeared to me very singular, that although *Eyre*, Chief Justice, and *Heath* and *Rooke*, Justices, sat in the Common Pleas, and decided both cases, the decision in *De Berdt v. Atkinson* was not cited nor adverted to in *Nicholson v. Gouthit*, if it established a different principle, either by the Court or counsel, although nineteen months only had intervened. I was led to remark on the trial that *Chitty* (who is generally deemed a very correct compiler, in his treatise on Bills and Notes, p. 87, 1 Lond. ed.) lays down the broad proposition that the payee of a note, indorsing it to give it currency, and knowing the insolvency of the maker at the time, cannot insist on the want of notice as a defence; and yet, though he cites *Nicholson v. Gouthit*, in the following page he does not consider it as effecting any change in the commercial law before asserted. In the New York case, 2 Caines, 343, notice was given to the indorser of non-payment by the drawer, prior to any demand upon the drawer, and consequently the notice was null, as the drawer was not in default when he received notice. I placed too much reliance on the circumstances

detailed in the cases of 1794 and 1795, without sufficiently attending to the reasoning of the Court therein, which is contradicted in the later cases. *Esdaile v. Sowerby*, in 1809, 11 East, 117, was not cited on the trial, but it is held therein by the whole court that *Nicholson v. Gouthit* is so decisive an authority on this subject, that the Court could not again enter into the discussion of the doctrine. It seems now settled, that notwithstanding it sounds harsh that a known bankruptcy should not be equivalent to a demand or notice, the rule as to both is too strong to be dispensed with. At the same time, I cannot see how the defendant can get over the late case of *Bond et al. v. Farnham*, in 1809, 5 Mass. 170. In this instance, James Brown, one of the partners in the firm, when the note fell due on the fifth of June, 1812, was in Europe, and had been there some time before; Armat Brown, the only resident partner in America, had assigned all his real and personal estate to the defendant to indemnify him for his advances and indorsements. Against neither could any effective measures be pursued within the period of imputed delay. In the language of Chief Justice *Parsons*, "any demand by the defendant would be *fruitless*, as he had secured all the property the drawer on the spot had, for the express purpose of keeping him harmless." The reason of the rule as to notice, must wholly fail under such circumstances. On this last ground, I am of opinion, that judgment be rendered for the plaintiff on the verdict.

New trial refused.

Though there is some conflict among the early cases, as shown by the cases referred to in the opinion *supra*, respecting the necessity of notice in the case of the insolvency of the payor, known to the drawer or indorser, the later authorities, and the text-writers state the rule as declared in the principal case. Mr. Justice *Story* (*Promissory Notes*, § 286) says that "it is by our law, as well as by the French law, no excuse that the maker is a bankrupt, or is insolvent, at the time when the note becomes due; and this (as is asserted) for two reasons: first, that it is part of the implied obligations or conditions of the contract of the indorser, that due presentment shall be made in order to bind him to pay upon the dishonor; and secondly, that it is not certain, that if due presentment had been made, the note, notwithstanding the failure, might not have been paid, either by the maker or by some friend for him. Each of these reasons has been promulgated, not only in the common-law authorities, but by foreign jurists of high repute, such as *Pothier* and *Savary*."

Upon this subject, Chitty (*Bills*, 330) says: "The death, bankruptcy, or *known insolvency*, of the drawee, or his being in prison, constitute no excuses, either at law or in equity, for the neglect to give due notice of non-acceptance or

non-payment: because many means may remain of obtaining payment by the assistance of friends or otherwise; of which it is reasonable that the drawer and indorsers should have the opportunity of availing themselves, and it is not competent to the holders to show that the delay in giving notice has not in fact been prejudicial." The same writer again uses this language, in substance, on p. 450; with the additional statement that an offer of composition by the acceptor, not acceded to, with a declaration in the presence of the drawer and holder that he (the acceptor) had not and should not provide for the bill, will not dispense with notice of dishonor. See *Ex parte Bignold*, 2 Mont. & A. 633. See also Chitty, Bills, 493; Story, Bills of Exchange, § 375.

The early cases which support a different doctrine are *Bogy v. Keil*, 1 Mo. 743; *Stothart v. Parker*, 1 Tenn. 260; *Clark v. Minton*, 2 Brev. 185. See *Kiddell v. Ford*, 3 Brev. 178; *Ex parte Solarte*, 2 Deac. & C. 261, as explained in *Ex parte Johnston*, 1 Mont. & A. 622, 626, per *Erskine, C. J.* In the early case of *Jackson v. Richards*, 2 Caines, 343, *Kent, C. J.*, said that the rule in *Nicholson v. Gonthit*, requiring notice, was "best, and ought to be followed." The cases to the contrary have long since been disregarded; and the rule stated in the principal case is now considered as well settled. See *Allwood v. Haseldon*, 2 Bailey, 457; *Mechanics' Bank v. Griswold*, 7 Wend. 165, 169; *Buck v. Cotton*, 2 Conn. 126; *Sandford v. Dillaway*, 10 Mass. 52; *Barker v. Parker*, 6 Pick. 80; *Shaw v. Reed*, 12 Pick. 132; *Granite Bank v. Ayres*, 16 Pick. 392; *Hunt v. Wadleigh*, 26 Me., 271; *Lawrence v. Langley*, 14 N. Hamp. 70; *Bank of America v. Petit*, 4 Dall. 127; *Benedict v. Caffé*, 5 Duer, 225; *Watkins v. Crouch*, cited at length, *infra*; *Boulton v. Stubbs*, 18 Ves. 21, per *Lord Eldon*; *Staples v. Okines*, 1 Esp. 332; *Esdale v. Sowerby*, 11 East, 117.

Upon the other point made in the principal case, that notice may be dispensed with in case of an assignment of *all* the assets of the payor to the drawer or indorser, the law is pretty well settled that way, especially if the fund is sufficient to protect him. See *Mechanics' Bank v. Griswold*, 7 Wend. 165; *Spencer v. Harvey*, 17 Wend. 489; *Coddington v. Davis*, 3 Denio, 16; s. c., 1 Comst. 186; *Bank of South Carolina v. Myers*, 1 Bailey, 412; *Kramer v. Sandford*, 4 Watts & S. 328; *Stephenson v. Primrose*, 8 Port. Ala. 155; *Perry v. Green*, 4 Harrison, 61; *Andrews v. Boyd*, 3 Met. 434; *Prentiss v. Danielson*, 5 Conn. 175; *Duval v. Farmers' Bank*, 9 Gill & J. 31, 47; *Lewis v. Kramer*, 3 Md. 265; *Marshall v. Mitchell*, 34 Me. 227; *Denny v. Palmer*, 5 Ired. 610; *Martel v. Tureauds*, 18 Martin, 118; *Watkins v. Crouch*, 5 Leigh, 522, cited at length, *infra*.

But if the payor make an assignment in trust for the benefit of his creditors, and among them of the indorser, this will not excuse demand and notice; for such a trust is a mere indemnity against his legal liabilities, which being conditional would become absolute only by due demand and notice. *Creamer v. Perry*, 17 Pick. 332. In this case *Shaw, C. J.*, said: "On the first ground we think that the most which could be made of the evidence, is that after this note was made, but several months before it became due, the promisor made an assignment to trustees, upon trust, among other things, to secure the defendant for all debts due to him from the promisor, and to indemnify him against all his liabilities. Without stopping to consider whether, after his property was surrendered by the trustees, the defendant could have availed himself of it, we

think the effect of this assignment was to secure and indemnify the defendant against his legal liabilities; and as his liability as an indorser on this note was conditional, and depended upon the contingency of his having seasonable notice of its dishonor, his claims upon the property depended upon the like contingency." See *Haskell v. Boardman*, 8 Allen, 38; *Moses v. Ela*, 43 N. Hamp. 557; *Wilson v. Senior*, 14 Wis. 380.

And the same is true where the indorser has received from the payor a chose in action as collateral security to indemnify him for his indorsement. He is still entitled to notice. *Kramer v. Sandford*, 3 Watts & S. 328; *Seacord v. Miller*, 3 Kern. 55; *Otsego County Bank v. Warren*, 18 Barb. 290, in which the decision was based in part on the ground that the security was given *after* the maturity of the note.

The case may also require notice, if the fund assigned is insufficient to save the drawer or indorser harmless; and the burden of proof seems to be on the plaintiff suing without notice, to show that the fund was sufficient to protect the defendant. In the absence of proof the latter will have judgment. *Watkins v. Crouch*, 5 Leigh, 522; *Brooke, J.*, dissenting. See also *Denny v. Palmer*, 5 Ired. 610. In *Watkins v. Crouch*, the Court said:—

CARR, J. This case turns upon the correctness of the opinions expressed by the Court in instructions to the jury. These instructions were, in effect, that the indorser having taken a transfer to trustees for his indemnity, of all the effects of the maker, was thereby placed in the shoes of the maker; and as a demand of payment at the place appointed in the note, is not necessary to charge the maker, so no such demand was necessary under such circumstances, to fix the liability of the indorser. The deed is made an exhibit in the bill of exceptions, and I think may fairly be considered a conveyance of all the grantor's property. It is given for the security of several enumerated debts; and among others, of *one-fourth* of the note on which the suit was brought. What was the value of the property, or what proportion it bore to the debts intended to be secured by it, does not appear; that it was not sufficient to secure the whole, we are obliged to conclude. The question is, was this opinion of the Court correct?

Whether, where the suit is against the maker of a promissory note, payable at a particular place, it is necessary to prove a demand of payment at such place, is a question that need not be discussed, until we are satisfied that the indorser in the case before us stands in the shoes of the maker. But we may lay it down as unquestioned law, that as a general proposition, the indorser stands in a situation very different from the maker. He is not the real debtor, but a surety only; his undertaking is collateral, that if upon due diligence having been used against the maker, the money is not paid, he will become liable for it. This due diligence is a condition precedent to a right of recovery against him. Therefore, when a note is made payable at a particular place, proof of a demand at the place, is indispensable, in a suit against the indorser. Did the deed place the indorser completely in the shoes of the maker? I should agree that it did, if it appeared, that the property conveyed was sufficient for full indemnity against the note, and was by the deed appropriated to such indemnity; but the sufficiency of the property makes no part of the case; and it appears by the deed, that the trustees are not authorized to appropriate any part of it to indemnity against more than a fourth of the note. It was said, however, that the

property, whether adequate or not, was all the maker had; and that having thus become utterly insolvent, there could be no hope of his providing funds at the bank to discharge the note, and therefore no necessity of presenting it. But we see, from many cases, that the most perfect knowledge of the insolvency or even bankruptcy of the maker, does not dispense with a due presentment and notice of dishonor. He may have friends or credit; or the sagacity and vigilance of the indorser may discover other sources of indemnity. It is his own affair, and he ought to be the judge. It is in this aspect of the case, that Lord *Eldon* in *Boulton v. Stubbins*, 18 Ves. 21, says, that "if the acceptor of a bill becomes bankrupt, the holder must give notice to the drawer; as another person has no right to judge what are his remedies." But it was said, that here the insolvency is produced by the indorser himself; that he has appropriated to his own use the funds which might have gone to discharge the note; and that we cannot suppose such a conveyance would be made, without an agreement between the parties, that the indorser should attend to the note, take the maker's place, and release him from all further care about it. I cannot perceive the correctness of this reasoning. Why should the indorser take the maker's place? Was it not better that he should continue to hold his station of collateral surety? better both for himself and the maker? He was bound conditionally for the debt; and he might well say to the maker, "My friendship for you has led me into this engagement; it is but fair, that you secure me, so far as you can; your property may not pay a fourth of the debt, yet it will be something; in the mean time, we will continue to hold our relations of principal and surety: before the note comes to maturity, new prospects may open upon you, new friends may arise, new accessions of fortune may fall in; and the holder of the note will have to proceed with due diligence before he can come upon me." Is not this the more natural course? And does it invade any right of the holder, or impose any hardship on him? No; he has only to attend to his own interest, and pursue the beaten track of due diligence. I cannot think then that by the execution of the deed, the indorser lost his character of surety, and became a principal debtor; and I am of opinion, that in order to charge him, it was incumbent on the holder of the note to prove, at least, a presentment at the place of payment, if not due notice of such presentment. It will be observed, that I have cited no cases in support of this opinion; not that I have not read, and considered, and puzzled myself with, the multitude that were commented on in the argument; but because, finding them like the Swiss troops, fighting on both sides, I have laid them aside, and gone upon what seems to me the true spirit of the law. I think the judgment should be reversed.

CABELL, J. As to the indorser, he does not become a debtor by his indorsement. He is a surety for the debt of another, and becomes bound to pay, only on the condition that the debt shall not be paid by the maker, after due diligence shall have been used, and notice given of non-payment. Where a note is payable at a particular time and place, due diligence requires that it shall be presented at that time and place. Such being the terms of the undertaking of an indorser, it is incumbent on the holder of a note, to show a compliance with them, on his part, by suitable averments in his declaration, and by proper proofs at the trial, or to show, in like manner, a proper excuse for their omission. These terms not having been complied with in this case, we have only to examine into the sufficiency of the excuse offered by the plaintiffs.

It is perfectly settled that the insolvency or bankruptcy of the acceptor of a bill of exchange, or the maker of a promissory note, and knowledge, on the part of the indorser, of that insolvency or bankruptcy, and that the note cannot and will not be paid by the acceptor or maker, will not exempt the holder from the obligation of due presentment and notice of dishonor. *Nicholson v. Gonthit*, 2 H. Bl. 610; *Staples v. Okines*, 1 Esp. 332; *Esdale v. Sowerby*, 11 East, 147. Many other cases to the same effect might be cited from the courts of England and of our own country; but it cannot be necessary. In *Staples v. Okines*, the drawer of a bill of exchange, having effects in the hands of the drawee, was told by the drawee, before it became due, that he, the drawee, could not pay it; and it was then *understood between them* that the drawer would have to provide for it; yet even this knowledge on the part of the drawer, and this understanding between him and the drawee, did not excuse the want of notice. In fact, if the indorser remains passive, if he does nothing, and the holder fails either to make due demand of payment, or to give notice of the dishonor of the note, the indorser can rarely, if ever, be made liable.

There are, however, some acts of the indorser, antecedent to the time of payment of the note, that will excuse the want of notice. But an examination of the cases will show that they are such acts of the indorser as would make it fraudulent or improper in him, towards the holder or maker, to insist on notice. Thus, where the drawer of a bill, a few days before it became due, stated to the holder that he had no regular residence, and that he would call and see if the bill had been paid by the acceptor, it was held that he was not entitled to notice from the holder, "he having taken upon himself the duty of inquiring if the bill was paid." *Phipson v. Kneller*, 4 Camp. 285. So also where the drawer of a bill, upon being applied to by the holder, before it became due, to know whether it would be paid, said it would not be paid, it was held that notice of non-payment was not necessary. *Brett v. Levett*, 13 East, 213. This case, seemingly inconsistent with previous decisions, may be reconciled to them on this ground, and on this ground only; namely, that it would be a fraud in the drawer towards the holder to avail himself of the omission to give notice of the non-payment of the bill, after he himself had declared to the holder that it would not be paid; a declaration which probably produced the very omission of which he sought to avail himself.¹

In *Cornay v. Da Costa*, 1 Esp. 303, it was decided, that where the indorser of a note had taken from the maker, before the note became due, effects to the amount of the note, for the purpose of paying it, he was not entitled to notice. Bayley, in his treatise on Bills of Exchange, p. 202, referring to this case, says: "If the payee of a note lends his name, and takes effects of the drawer to answer it, he is not entitled to notice, because he is the proper person to pay it, and would be entitled to no remedy over on making payment." And in *Brown v. Mafley*, 15 East, 217, 222, he farther explains the ground of the decision, by saying, that "it would have been a fraud in the indorser to call upon the maker of the note, because, before it became due, the maker had deposited effects in his hands to answer the amount of his indorsement."

Let us now see if the case before us comes within the principles of any of

¹ See *post*, p. 475.

these cases. In our case, there was no communication between the indorser and holder; nothing was said or done, calculated to mislead the holder, and seduce him into the neglect of a duty which he might otherwise have performed. As to his consent that the note should be negotiated at the Bank of the United States, it was of no kind of consequence; the holder had a right, without his consent, to negotiate it where he pleased. The face of the note told the holder that it has to be paid at the Farmers' Bank. It is, therefore, unlike the cases of *Phipson v. Kneller*, and of *Brett v. Levett*, already commented on. It is equally unlike the case *Cornay v. Da Costa*; in that case, there was an assignment to the indorser, of effects *to the amount of the indorsement*. Here, there is an assignment of all the property of the maker; but it does not appear that it was equal to the amount of the indorsement. We are not at liberty to say that it was so; for it is neither averred nor proved. And we must not forget that the burden of proving every matter of excuse is upon the holder. It was not incumbent on the indorser to prove any thing. We must take it, then, in this case, that the property was not sufficient; and, not being sufficient to discharge the whole amount of the indorsement, "the indorser was not the proper person to pay the note;" that part of it at least to which the assigned effects were insufficient. It cannot be said of him, as was said of the drawer in *Cornay v. Da Costa*, that "he had no remedy over on making payment," or, that "it would have been a fraud in the indorser to call on the maker." As to the part of the note, to the payment of which the assigned property was insufficient, he had an unquestionable right to call on the maker; and as to this he stood on his original undertaking as indorser, under no more obligation to pay it than he would have been to pay the whole note if no property at all had been assigned, and, consequently, all the original obligations of the holder still subsisted.

The indorser, in taking an assignment of property sufficient to pay only part of the note, did not undertake to pay the residue. It may be confidently asserted that there is not, in the terms of the assignment, any express contract to that effect; nor can I see a single circumstance in the whole transaction from which such a contract can be implied. The assignment of property sufficient only for the partial indemnity of the indorser was a matter between him and the maker of the note. There was no motive in either of the parties to that arrangement, which could induce a wish that the indorser should waive the condition of his liability. How, then, can we imply such waiver, in favor of a person who was no party to the arrangement? In the case of *Staples v. Okines*, where the acceptor of a bill of exchange told the drawer that he, the acceptor, could not pay it, and where it was even *understood between the drawer and acceptor* that the drawer would have to provide for it, no waiver of notice was implied, in favor of the holder. How then can we imply it from the mere fact of a partial indemnity? Suppose the maker of this note had had no other property but money (not equal however to the amount of the note), and had put that money, all he had, into the hands of the indorser, to be applied by him to the payment of the note. Would this have exempted the holder from the obligation of presenting the note, and giving notice of its dishonor? Certainly not; and I am unable to see any difference between the deposit of money and the assignment of property so far as regards the point under consideration.

Nor is there any resemblance between an indorser of a note, partly indem-

nified, and the drawer of a bill of exchange, who withdraws his effects from the hands of the acceptor, before the day of payment. In the latter case, the drawer has no right to expect that the acceptor will pay; and therefore he is not entitled to notice. But the indorser's right to notice from the holder, depends on another principle; namely, his remedy over against the maker. And this principle applies as forcibly to a case where a part only of a note remains unpaid or unprovided for by the maker, as where the whole of it remains so unpaid or unprovided for.

Again, the assignment in this case was made about a month before the note was to fall due. It is impossible for us to say, that no accession was made, in that interval, to the maker's means of payment; and, of course, we cannot say, that notice to the indorser would have been unavailing.

Although I have not adverted, by name, to the cases which have been decided on this subject, in our sister States, I have not been inattentive to them. I have not, however, been convinced by them; and I have, in the course of the preceding remarks, controverted every reason on which they were founded; whether successfully or not, is left for others to determine.

Upon the whole, I am of opinion, that the holders of the note before us, were bound to proceed strictly with it, as respects the indorser, both as to demand of payment, and as to notice; and, consequently, that the judgment must be reversed, on account of the erroneous instruction given at the trial.

Judgment reversed.

However the rule may be in case the fund assigned is not sufficient to cover the paper, though embracing all the effects of the payor, the authorities are agreed that if the fund is placed directly in the hands of the indorser or drawer, and is sufficient to protect him, notice may be dispensed with. Farther than this it seems difficult to go, without impairing one of the most salutary and reasonable rules of the law. It is impossible to predict what may be the circumstances or situation of the insolvent to-morrow. It is not infrequent for fortune and friends to favor such a one in his adversity, and place him in a situation to meet his obligations. At any rate it is a slight matter for the holder to present his paper and give notice of dishonor; he expected and assumed that duty in taking it; and he would be either careless or imprudent to fail in performing it. From this the law should not excuse him.

THE PRESIDENT, DIRECTORS, &C., OF THE BERKSHIRE BANK
v. ISAAC JONES.

(6 Massachusetts, 524. Supreme Court, September, 1810.)

Waiver of notice. Payable at bank. — Waiving notice by an indorser does not excuse the indorsee from making demand of payment; but if the paper was payable at a designated place, and the indorsee was ready to receive payment at the time and place, no further demand is necessary.

THE plaintiffs declare on a promissory note made by one Amasa Glesen, on the twenty-first of October, 1807, by which he promised the defendant to pay him or his order \$125, at the Berkshire Bank, in sixty-one days; and on an indorsement by the defendant, he waiving all right to the notice, to which, by law or custom, he was entitled as indorser. The plaintiffs also allege a request and refusal by Glesen, the maker, and also notice to the defendant.

The action was tried before *Sedgwick, J.*, who directed a nonsuit, subject to the opinion of the Court, whether it was necessary to the support of this action, that, previous to the commencement thereof, the contents of the note declared on should have been demanded of the promisor.

PARSONS, C. J. The defendant has argued that, although he waived notice of a refusal of payment by the maker, yet he did not thereby dispense with a demand upon him; for he might waive the notice from a confidence that the maker would pay the note on demand.

This construction of the waiver we think correct; and the objection would be conclusive, if the indorsement had not been made to the plaintiffs, at whose office the note was to be demanded and paid. The note was payable on a day and at a place certain; and the place is the Berkshire Bank. A demand of payment need not be made at any other place; and if the holder of the note is at the bank on the prescribed day, ready to receive the money, if the maker be there, it is enough for him. And if the maker does not come to the bank, or direct the payment there, he has broken his promise; and no other notice to him is necessary.

In the case at bar, as the plaintiffs held this note, we must presume it was in their bank, and there it was made payable. They were not to look up Glesen, or to demand payment of him at any other place. The defendant, by his indorsement, guaranteed that on the day of payment the maker would be at the bank, and pay the note; and if he did not pay it there, he agreed that he would be answerable in a suit at law, without previous notice of the default of the promisor.

Although we are satisfied that the judge was correct in his construction of the terms of the defendant's waiver of notice, considered in a general view, yet we are of opinion that, from the special tenor of the note declared on, the nonsuit ought to be set aside; and if, on the trial, the plaintiffs can show that on the day of payment the note was in the bank, and that the servants or officers of the plaintiffs were there during the usual bank hours, to receive payment and give up the note, they will be entitled to recover, as, by the terms of the note, they were not holden to demand payment but at the bank, which was impracticable through the default of the maker; and by the defendant's waiver he cannot claim notice.

The doctrine that waiver of notice does not embrace waiver of demand may be regarded as well settled. See *Buchanan v. Marshall*, 22 Vt. 561; *Low v. Howard*, 11 Cush. 268, 270; *Drinkwater v. Tebbetts*, 17 Me. (5 Shepl.) 16; *Burnham v. Webster*, ib. 50; *Lane v. Steward*, 20 Me. (2 Appl.) 98; *Backus v. Shipherd*, 11 Wend. 629. But the contrary was held in *Matthey v. Gally*, 4 Cal. 62.

The indorsement, "eventually accountable, E. A. E.," is held to waive both demand and notice. *McDonald v. Bailey*, 14 Me. (2 Shepl.) 101. So of the following: "William Arnold, Holden, Aug. 11th, 1836." *Bean v. Arnold*, 16 Me. (4 Shepl.) 251.

Whether waiver of protest will excuse both demand and notice has been the subject of conflict. The question is discussed in *Union Bank v. Hyde*, 6 Wheat. 572, and arose from the following writing, signed by the defendant, an indorser: "I do request that hereafter any notes that may fall due in the Union Bank, on which I am or may be indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been or should be legally protested." The Court held that this constituted a waiver of demand and notice, in connection with the fact that both parties had had a course of dealing founded on that construction. Mr. Justice *Johnson*, in delivering the opinion of the Court, said: "The case presents the right of the plaintiffs under two aspects: 1. Upon the just construction of the written instrument. 2. The practical exposition of it by the defendant himself; and it might also have presented a third: the specific waiver of demand and notice on the note in suit. By some assumed analogy, or mistaken notions of law, this practice of protesting inland bills has now

become very generally prevalent; and since the inundation of the country with bank transactions, and the general resort to this mode of exposing the breaches of punctuality which occur upon notes, a solemnity, cogency, and legal effect have been given to such protests in public opinion, which certainly has no foundation in the law merchant. The nullity of a protest on the legal obligations of the parties to an inland bill, is tested by the consideration that, independently of statutory provision (if any exists anywhere) or conventional understanding, the protest on an inland bill is no evidence in a court of justice of either of the incidents which convert the conditional undertaking of an indorser into an absolute assumption.

“The protest belongs altogether to foreign mercantile transactions, upon which, on the contrary, it is an indispensable incident to making a drawer of a bill, or indorser of a note, liable. On foreign bills, it is the evidence of demand, and an indispensable step towards the legal notice of non-payment, in consequence of which the undertaking of the drawer or indorser becomes absolute. Hence, as to foreign transactions, it is justly predicated of a protest, that it has a legal or binding effect.

“But the writing under consideration has reference exclusively to inland bills, and as to them the protest has no legal or binding effect. The indorser became liable only on demand and notice, and of these facts the protest is no evidence. How, then, shall the waiver of the protest be adjudged a waiver of demand and notice, or in effect convert his conditional into an absolute undertaking?

“Had the defendant omitted one word from his undertaking, it would have been difficult to maintain an affirmative answer to this proposition. But what are we to understand him to intend, when he says: ‘I will consider myself bound in the same manner as if said notes had been or should be legally protested?’ Except as to foreign bills, a protest has no legal binding effect, and as to them it is evidence of demand, and incident to legal notice. It either then had this meaning or it had none.

“This reasoning, it may be said, goes no further than to a waiver of the demand; but what effect is to be given to the word bound? It must be to pay the debt, or it means nothing. But to cast on the indorser of a foreign bill an obligation to take it up, protest alone is not sufficient; he is still entitled to a reasonable notice in addition to the technical notice communicated by the protest. To bind him to pay the debt, all these incidents were indispensable, and may, therefore, be well supposed to have been in contemplation of the parties, when entering into this contract.

“It is not unworthy of remark, that the writing under consideration asks a boon of the plaintiff, for which it tenders a consideration. It requests to be exempted from an expense, exposure, or mortification, on the one hand; and on the other, what is tendered in return? The intended object and conceived effect of the protest, on the one hand, is to convert his undertaking into an unconditional assumption, and the natural return is to make his undertaking at once absolute, as the effectual means of obtaining the benefit solicited.

“If this course of reasoning should not be held conclusive, it would at least be sufficient to prove the language of the undertaking equivocal; and that the sense in which the parties used the words in which they express themselves, may fairly be sought in the practical exposition furnished by their own conduct, or the

conventional use of language established by their own customs or received opinions.

"On this point the evidence proves that, by the understanding of both parties, this writing did dispense with demand and refusal; that the company, on the one hand, discontinued their practice of putting the notes indorsed by defendant in the usual course for rendering his assumption absolute, and the defendant, on the other, continued up to the last moment to acquiesce in this practice, by renewing his indorsements, without ever requiring demand or notice. This was an unequivocal acquiescence in the sense given by the company to his undertaking, and he cannot be permitted to lie by, and lull the company into a state of security, of which he might at any moment avail himself, after making the most of the credit thus acquired.

"Judgment reversed, and *venire facias de novo* awarded."

See *Duvall v. Farmers' Bank*, 7 Gill & J. 44; 9 id. 31.

The same question arose in *Coddington v. Davis*, 1 Comst. 186. *Gardner, J.*, in delivering the opinion of the Court, said: "The plaintiff in error, the defendant below, was the indorser of a note made by Thomas Coddington for \$10,000. Thomas Coddington failed, and on the twenty-third of January, 1840, made an assignment to Davis, one of the firm of Davis, Brooks, & Co., the indorseees and holders of the note and the plaintiffs below. On the twenty-eighth of January, and prior to the maturity of the note, the defendant, with full knowledge of the above facts, wrote the following letter:—

"MESSRS. DAVIS, BROOKS, & Co. Gents,—Please not protest T. B. Coddington's note due second of February, for ten thousand dollars, and I will waive the necessity of the protest thereof; and oblige respect'ly, &c.

"SAMUEL CODDINGTON."

"The construction of this letter is the first important question presented in the cause.

"The term protest in a strict technical sense is not applicable to promissory notes. The word, however, as I apprehend, has by general usage, acquired a more extensive signification, and in a case like the present includes all those acts which by law are necessary to charge an indorser. When among men of business a note is said to be protested, something more is understood than an official declaration of a notary. The expression would be used indifferently to indicate a series of acts necessary to convert a conditional into an absolute liability, whether those acts were performed by a mere clerk or a public officer. It is obvious that the word was used in its popular acceptance by the defendant below. He requests the indorseees 'not to protest the note, and that he would waive the necessity of the protest thereof.'

"The protest to which the indorser alluded was something 'necessary' to be done, something also for the benefit of the indorser, for he assumed to waive it. It could not therefore be a memorandum, or a declaration made by a notary, because neither of them were required. Nor could he have intended to waive that which whether performed or omitted, his right would in no manner be affected. The only things necessary on the part of the indorseees was a demand of payment of the maker, and notice to the indorser. By waiving the necessity of protest the defendant dispensed with both, or his communication is destitute of all meaning.

“ It was argued indeed that the defendant might have referred to the notarial certificate authorized by statute. But this certificate is made *prima facie* evidence of a demand and notice in favor of the indorsees. It is for their benefit. The defendant in making such reference must have supposed that the certificate was necessary evidence, because he waives the necessity of a protest, which, according to the argument is equivalent to dispensing with the necessity of a notarial certificate. Now to every fair mind, waiver of proof necessary to establish a particular fact, is equivalent to an agreement to admit it. Whether, therefore, the defendant by waiving the necessity of a protest, intended to dispense with demand and notice, or with the evidence of them, the result would be the same, and in either case he is concluded by his own stipulation from raising the objection taken upon the trial. I agree with the learned judge who delivered the opinion of the Supreme Court, that the circumstances attending the written stipulation of the defendant confirm this view; but I prefer to rest my opinion upon the letter alone, as furnishing *prima facie* evidence of an intent by the indorser to waive demand of payment and notice to which he was otherwise entitled.”

But it is held in *Buckley v. Bentley*, 42 Barb. 646, that waiver of notice of protest does not waive presentment and demand. The expression “ I waive demand of protest ” was held in *Porter v. Kemball*, 53 Barb. 467, to include presentment and notice. It was also held in that case that if the expression was ambiguous, parol evidence was admissible to explain its meaning. See 1 Parsons, Notes and Bills, 584, 585.

The strict construction has been adopted in Louisiana, upon the authority of *Union Bank v. Hyde*, *supra*. In that State it is held that waiver of protest does not dispense with notice. *Bird v. LeBlanc*, 6 La. An. 470; *Wall v. Bry*, 1 La. An. 312. In *Bird v. Le Blanc*, the case of *Coddington v. Davis*, *supra*, was before the Court. See also *Scott v. Greer*, 10 Penn. State, 103.

If one write a guaranty over his name, on the back of a bill or note, the better opinion is that his liability is that of guarantor, and not of an indorser; so that demand and notice are not required as to him. See *Hall v. Newcomb*, 7 Hill, 416, *ante*, p. 131.

JOHN SIGERSON, Plaintiff in Error, v. EDWARD MATHEWS.

(20 Howard, 496. Supreme Court of the United States, December, 1857.)

Promise to pay, when a waiver. — If, before the maturity of a note, the indorser dispensed with a presentation of the note and demand of payment, and promised to pay it or to provide for its payment at maturity, he cannot set up as a defence to a suit upon the note, that it was not presented for payment, and demand made therefor, when it was due, and that no notice of its dishonor was given. Or if, after the maturity of the note, the indorser promised the holder or his agent to pay the same, having at the time of making said promise knowledge of the fact that the note had not been presented for payment, and that no demand had been made therefor, or notice of non-payment given, the indorser cannot now set up as a defence to the note, a want of such demand and notice.

THE case is stated in the opinion of the Court.

MCLEAN, J. This is a writ of error to the Circuit Court for the district of Missouri.

An action was brought by Mathews against John Sigerson, as indorser on a note of James Sigerson, now deceased, dated the tenth of March, 1852, for the payment of the sum of two thousand dollars, two years after date, at the Bank of the State of Missouri, with interest from the date.

It was proved on the trial that in 1851 Mathews advanced largely to John Sigerson on some transactions in pork, whereby Sigerson became indebted to him in the sum of two thousand dollars; that Sigerson wanted two years' time, on which Mathews required a mortgage on real estate as security; but Sigerson offered to give the note of his brother James, indorsed by himself, instead of the mortgage; and he represented that his brother James was the owner of a valuable real estate near St. Louis; which offer was accepted, and the note was given.

Some time in the fall of 1852, Joseph E. Elder, a witness, received the note from Mathews for collection, soon after the death of James Sigerson, and before the note became due. Witness called on John Sigerson, and asked him if he should have the note protested against the estate of James Sigerson. He replied, that the witness need not do so, and that the note should be paid at maturity. The witness then placed the note in his portfolio, where it remained until after due. After it was due, witness

called on John Sigerson, and informed him that he had neglected to put the note in bank for collection, and asked him what he was going to do; he said he would see witness in a few days, and arrange it. Afterwards Sigerson said to the witness that he did not consider himself liable as indorser, as the note had not been protested.

In February, 1852, John Sigerson sold his interest in the farm near St. Louis, which was one-half of it, and which contained about one thousand acres, to James Sigerson, who was to pay off the incumbrances on the land, which amounted to about sixteen thousand dollars. James executed twenty notes for two thousand dollars each, payable in six, twelve, and eighteen months; and John Sigerson made him a deed. In July, 1852, James reconveyed the land to John, and the bargain was rescinded. This was done because James had not fulfilled his contract. Nineteen of the notes were given up, but the note now in suit was not surrendered, and for which the account of James was credited on the books of John. James, on his decease, left no property.

On the above facts, the Court charged the jury, "if they believe from the evidence, that, before the maturity of the note, in conversation with the agent of the plaintiff, the defendant dispensed with a presentation of the note and demand of payment, and promised to pay it or provide for its payment at maturity, he cannot now set up as a defence to this suit, that the note was not presented for payment, and demand made therefor, when it was due, and that no notice of its dishonor was given."

That, "if, after the maturity of the note, the defendant promised the plaintiff or his agent to pay the same, having at the time of making said promise knowledge of the fact that the note had not been presented for payment, and that no demand had been made therefor, or notice of non-payment given, the defendant cannot now set up, as a defence to said note, a want of such demand or notice."

"If the defendant dispensed neither with the presentation of the note and notice, nor promised to pay the same, having knowledge as above stated, the plaintiff cannot recover."

Exception was taken to these instructions.

Certain instructions were asked by the defendant, which were refused; but it is unnecessary to state them, as they are substantially embraced in those given by the Court.

As there was no formal demand of payment, nor protest for non-payment and notice, those requisites must have been waived by the defendant, to make him responsible as indorser ; and to this effect were the instructions of the Court ; and we think the testimony not only authorized the instructions given, but also the verdict rendered by the jury. Before the note was due, the defendant said to Elder, the agent of Mathews, and who held the note, that he need not take steps to collect it from the estate of his brother James, as it should be paid at maturity. This was an assurance which could not be mistaken, and it was relied on by the agent. He placed the note in his portfolio, where it remained until after it became due. After this, the agent called on the defendant, and informed him that he had neglected to take measures for the collection of the note, and asked him what he was going to do ; he answered, that in a few days he would see the witness, and arrange it. This was an unconditional promise to pay the note, which no one could misunderstand, and which he could not repudiate at any subsequent period.

A promise by an indorser to pay a note or bill, dispenses with the necessity of proving a demand on the maker or drawer, or notice to himself. *Pierson v. Hooker*, 3 Johns. 68 ; *Hopkins v. Liswell*, 12 Mass. 52.¹ Where the drawer of a protested bill, on being applied to for payment on behalf of the holder, acknowledged the debt to be due, and promised to pay it, saying nothing about notice, it was held that the holder was not bound to prove notice on the trial. *Walker v. Lavery*, 6 Munf. 487. An unconditional promise by the indorser of a bill to pay it, or an acknowledgment of his liability, and knowledge of his discharge by the laches of the holder, will amount to an implied waiver of due notice of a demand of the drawee, acceptor, or maker. *Thornton v. Wynn*, 12 Wheat. 183 ; *Bank of Georgetown v. Magruder*, 7 Peters, 287. We think the instructions of the Court were correct, and that consequently the judgment must be affirmed, with costs.

But the promise to pay must be clear and distinct. *Creamer v. Perry*, 17 Pick. 332. In delivering the opinion of the Court in this case, Chief Justice Shaw said : " If an indorser, knowing that there has been no demand and notice, and conversant with all the circumstances, will promise to pay the note, this is to be deemed a waiver. But these rules in regard to notice and waiver are to

¹ See *ante*, p. 465.

be held with some strictness, in order to insure uniformity of practice and regularity in their application. . . .

In the present case we are of opinion that the evidence falls short of proving a promise by the defendant, either to pay the note or see it paid. The agent of the plaintiff applied to the defendant, some days after the note had become due, obviously for the purpose of obtaining from him a renewed promise. The strongest expression used by the defendant in the course of a long conversation was, 'the note will be paid.' This is quite as consistent with the hypothesis that it was a mere assertion of his expectation that it would be paid by the promisor, as of a promise on his part to pay it; and from the general tenor of the conversation, we think it cannot be inferred that it was his intention, knowing of his discharge, to waive his defence and promise to pay the note, or see it paid at all events." In *Rogers v. Stephens*, 2 T. R. 713, however, it was held that the reply of the drawer of a bill upon its dishonor that "it must be paid," amounted to a promise to pay, and removed the necessity of notice. See also *Borradaile v. Lowe*, 4 Taunt. 93; *Richter v. Selin*, 8 Serg. & Rawle, 425, 438; *Griffin v. Goff*, 12 Johns. 423; *Martin v. Ingersoll*, 8 Pick. 1; *Harrison v. Bailey*, 99 Mass. 620; *Low v. Howard*, 11 Cush. 268; *Kelley v. Brown*, 5 Gray, 108; *Arnold v. Dresser*, 8 Allen, 435. In the last case *Bigelow*, C. J., said in reference to waiver of demand: "No such waiver is made where an indorser promises to pay the note in ignorance of the fact that he has been discharged by the laches of the holder, in not making due demand of the promisor, or where such promise is made under a misapprehension or mistake of facts concerning the due presentment and demand of the note." See to the same effect, *Walker v. Rogers*, 40 Ill. 278; *Morgan v. Peet*, 32 Ill. 281, 288; *Tobey v. Berly*, 26 Ill. 426; *Farrington v. Brown*, 7 N. Hamp. 271; *Woods v. Dean*, 3 Best & S. 101.

In *Gove v. Vining*, 7 Met. 212, *Shaw*, C. J., said: "The Court are of opinion that when the indorser, at or shortly before the time when the note becomes due, says to the holder that an arrangement for its payment is about being made, and in direct terms or by reasonable implication requests the holder to wait or give time, it amounts to an assurance that the note will be paid, — that the promisor or indorser will pay it, — and is a waiver of demand and notice. It tends to put the holder off his guard, and induces him to forego making a demand at the proper time and place; and it would be contrary to good faith to set up such want of demand and notice — caused perhaps by such forbearance — as a ground of defence. *Leffingwell v. White*, 1 Johns. Cas. 99; *Mechanics' Bank v. Griswold*, 7 Wend. 165; *Leonard v. Gary*, 10 Wend. 504; *Taunton Bank v. Richardson*, 5 Pick. 436; *Thornton v. Wynn*, 12 Wheat. 183; *Wood v. Brown*, 1 Stark. 217." See also *Union Bank v. Magruder*, 7 Peters, 287; *Spencer v. Harvey*, 17 Wend. 489; *Creamer v. Perry*, 17 Pick. 332; *Hoadley v. Bliss*, 9 Ga. 303; *Marshall v. Mitchell*, 35 Me. 221; *Phipson v. Kneller*, 1 Stark. 116; *Sheldon v. Horton*, 53 Barb. 23; *Amoskeag Bank v. Moore*, 37 N. Hamp. 539; *Barclay v. Weaver*, 19 Penn. State, 396; *Ridgway v. Day*, 13 id. 208; *Kent v. Warner*, 12 Allen, 561; *Wood v. Price*, 46 Ill. 435.

ACTIONS.

PEARCE v. AUSTIN.

(4 Wharton, 489. Supreme Court of Pennsylvania, March, 1839.)

Who may sue. — One to whom negotiable paper is indorsed as agent for another, may bring an action upon the same in his own name ; unless such agent's possession is shown to be *mala fide*.

THE case is stated in the opinion of the Court.

ROGERS, J. The suit was brought to recover the amount due on a promissory note, drawn by John Pearce, the defendant, payable sixty days after date, to the order of John Houghtin. It was indorsed in blank to Charles B. Austin, agent of the Union Glass Works, transferred by him to T. W. Dyott, and the suit is brought in the name of Charles B. Austin, agent of the Union Glass Works, who is the holder of the bill. The question is, can an agent bring a suit on a promissory note in his own name ? This is a question which depends altogether on authority. A holder of negotiable paper can maintain an action on it in his own name, without showing title to it. The Court will not inquire into his right to the paper, or his right to maintain a suit upon it, unless circumstances appear showing his possession to be *mala fide*. *Dean v. Hewit*, 5 Wend. 257 ; *Talman v. Gibson*, 1 Hall, 308 ; *Livingston v. Clinton* [cited], 3 Johns. Cas. 264.

In *Ogilby v. Wallace*, 2 Hall, 553, the right to sue even by a fictitious person, when the name of the real party was disclosed, unless some question arose as to the *mala fide* possession, was asserted. The Court nonsuited the plaintiff, on the ground that he was a fictitious person ; but on an appeal the nonsuit was set aside, that the question of fact, connected with the possession and presentation of the note, should be submitted to a jury. This principle applies to a note payable to bearer or indorsed in blank ;

for in either case an action can be maintained in the name of any person, without the plaintiff being required to show that he has any interest in it, unless he came into the possession of the note under suspicious circumstances. Here there is no allegation of *mala fide*, so that the case stands clear of that objection. The suit is brought by Austin, who is a trustee or agent for the company. He has the legal title to the bill, and the suit is brought in the name of the legal owner. Stating that he is the agent of the Union Glass Works is equivalent to saying that the suit is for their use. This brings it within the principle of the cases cited. But *Mauran v. Lamb*, 7 Cow. 174, is still nearer the point. It is there held that one holding a check or note payable to bearer, as a mere agent, may sue on it in his own name, and that it does not lie with the opposite party to assert the plaintiff's want of interest. It can certainly make no difference whether the note is payable to bearer, or indorsed in blank and in the possession of a *bona fide* holder.

Judgment affirmed.

The doctrine in a word is this: Possession of negotiable paper indorsed in blank is *prima facie* evidence of title; to defeat this presumptive title and right to sue, the defendant must prove that the plaintiff's possession is *mala fide*. This will shift the burden of proof upon the plaintiff. See *Goodman v. Simonds*, *ante*, p. 242, and note; *Pettee v. Prout*, *ante*, p. 217; *Way v. Richardson*, *ante*, p. 220.

In the case, however, of unnegotiable paper, or negotiable paper payable to order, the rule requires some qualification; for if A sues as payee of a bill or note payable to the firm of A, B, & Co., he must show that he alone constitutes that firm. 2 Greenl. Ev. §§ 163, 478; *Ferguson v. King*, 5 La. An. 642; *Robb v. Bailey*, 13 La. An. 457; *Fletcher v. Dana*, 4 Blackf. 377; *Desha v. Stewart*, 6 Ala. 852.

If the paper be payable to order and not indorsed, the rule is qualified to this extent, that the holder under the payee cannot sue in his own name, but must bring his action in the name of the payee. *Farwell v. Tyler*, 5 Iowa, 535; *Allen v. Newbury*, 8 Iowa, 65. So if it is payable to A for the use of B, A is the proper party to bring the action. *Cramlington v. Evans*, 2 Ven. 307; *Barry County v. McGlothlin*, 19 Mo. 307. But in Vermont the person beneficially interested may sue upon the paper in his own name. *Arlington v. Hinds*, 1 D. Chip. 431; *Rutland & B. R. Co. v. Cole*, 24 Vt. 33; *Johnson v. Catlin*, 27 Vt. 87.

In the case of a note or bill given by a firm to one of its members, the promisee cannot sue, as that would be to bring an action in part against himself; but if he indorse the paper, the indorsee may sue. *Thayer v. Buffum*, 11 Met. 398; *Pitcher v. Barrows*, 17 Pick. 361; *Smith v. Lusher*, 5 Cow. 688; *Davis v. Briggs*, 39 Me. 304.

But a different doctrine has been declared in Kentucky. *Morrison v. Stockwell*, 9 Dana, 172; *Allin v. Shadburne*, 1 Dana, 68. It is there held that where

the name of a firm is signed by one of two partners to a note payable to the other, it is, in effect, merely the note of the former to the latter; the payee may sue the other partner upon the note and recover the whole amount.

It is held in England that where the maker or acceptor has become executor of the payee, the debt is discharged, so that an indorsee cannot sue upon the paper. *Freakley v. Fox*, 9 Barn. & C. 130. Lord *Tenterden* explains that "it is considered to have been paid by the executor to himself, and becomes assets in his hands." But see *Kent v. Somervell*, 7 Gill & J. 265, 271; *Mitchell v. Rice*, 6 J. J. Marsh. 623, 628.

One who has indorsed paper for collection may sue upon it in his own name, notwithstanding his indorsement. *Dugan v. United States*, 3 Wheat. 172. Mr. Justice *Livingston*, on p. 182, went a step further and said: "If any person who indorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorseees, whose names he may strike from the bill or not, as he may think proper." *Welch v. Lindo*, 7 Cranch, 159, is overruled by this case; and *Dugan v. United States* is now the settled law. See *Bank of the United States v. United States*, 2 How. 711; *Dollfus v. Froeh*, 1 Denio, 367; *Watervliet Bank v. White*, 1 Denio, 608; *Bowie v. Duvall*, 1 Gill & J. 175; *Wood v. Tyson*, 13 La. An. 104.

Possession is not necessary to the plaintiff's right of action where the paper has been indorsed to another as agent or trustee for the plaintiff, if it be shown that such agent or trustee is ready to give up possession of the paper to the plaintiff for the purposes of the suit. *Stones v. Butt*, 2 Crompt. & Mees. 416. See *Hadwen v. Mendizabel*, 10 J. B. Moore, 477; *Marsh v. Newell*, 1 Taunt. 109; *Fisher v. Bradford*, 7 Greenl. 28.

Though a person who holds commercial paper as agent or trustee can sue upon it in his own name, a mere depositary must sue in the name of his principal. *Sherwood v. Roys*, 14 Pick. 172.

"The maker of a note payable to bearer, cannot defeat an action thereon brought in the name of one who had possession of the note at the commencement of the suit, and has continued to hold it ever since, by showing that a third party was the real owner of the note, when it appears that such third party has never objected to the possession of the plaintiff and the suit brought by him, but has expressly consented to and ratified such possession, and the prosecution of the action." Per *Foster, J.*, in *Wheeler v. Johnson*, 97 Mass. 39; citing *Beckman v. Wilson*, 9 Met. 436.

JAMES N. STAPLES *et al.* v. PRESIDENT, DIRECTORS, &C., OF
THE FRANKLIN BANK.

(1 Metcalf, 43. Supreme Court of Massachusetts, March, 1840.)

When action may be brought. — The maker of a promissory note is bound to pay it upon demand made at any seasonable hour of the last day of grace, and may be sued on that day, if he fail to pay on such demand.

Post-notes, issued by a bank, are payable on demand made at any time on the last day of grace, after the known and usual hour of opening the bank for business, and may be put in suit on that day, if payment is refused.

THE case is stated in the opinion of the Court.

SHAW, C. J. The present question comes before the Court upon the petition of a subsequent attaching creditor, to set aside and dissolve the attachment in the present suit. The Rev. Sts. c. 90, §§ 83–94, authorize an after attaching creditor to come in and obtain a dissolution of the prior attachment, by showing, if he can, either that the sum demanded in the first suit was not justly due, or that it was not payable when the action was commenced. The petitioner insists that his case is within the last provision of the statute; that the sum demanded in this writ was not payable when the action was commenced; and this is the question for our consideration.

The action is brought upon a bank post-note issued by the defendants, dated November 8, 1836, demanded at the bank, July 11, 1837, in the forenoon, after the commencement of banking hours. Payment was then refused, and an action was commenced, after the demand, the same forenoon. No tender, or offer of the amount, was made to the plaintiffs, either on the same day, or at any time afterwards.

In a recent case, it was held that the statute, giving days of grace on all promissory notes payable at a future day certain, in which there is not an express stipulation to the contrary, Rev. Sts. c. 33, § 5, applies to bank post-notes, and is not controlled or affected by the usages of banks. *Perkins v. Franklin Bank*, 21 Pick. 483. This note being entitled to grace by the statute, the eleventh of July was the last day of grace; and then the question

is, whether upon a demand and refusal of payment, within banking hours on the last day of grace, a right of action immediately accrues to the holder, so that he may then commence his action ; or whether he is bound to wait till the next succeeding day. It certainly struck me with some surprise that such a question should now be made, thinking, as I did, that it was well settled, by the law and practice of this Commonwealth, that a promissory note was due at any time within reasonable hours, on the last day of grace, and that upon presentment to the promisor, and a demand of payment, and on a neglect or refusal to pay, the note was dishonored, and a right of action immediately accrued to the holder against the maker ; and after due notice, actual or constructive, to the indorser, a like right of action, on the same day, accrued to the holder against the indorser. But as it appeared upon the argument that there is respectable authority for the contrary opinion, it becomes necessary to examine the subject with attention. Nothing is more important to a commercial community, than to have all questions relative to the rights and duties of holders, and all other parties to negotiable bills and notes, definitely settled. And it is greatly desirable, that throughout all the States of the Union, which, to many purposes, constitute one extended commercial community, the rules upon this subject should be uniform.

We will first consider the Massachusetts authorities on this subject, and then see how far they are supported or opposed by those of England or the other States.

The only question now is, whether a note is payable on demand on the last day of grace, when a note is entitled to grace. A different construction may perhaps apply, when a note is payable without grace. As grace was originally matter of indulgence and courtesy, and not of contract, it perhaps may be contended, that although a debtor has the whole of the last day of the credit stipulated for by contract to make payment, yet a different rule may apply to grace, which is not part of the contract. So when the third day of grace falls on Sunday, as the right of one or the other of the parties must yield, it shall be that of the one who claims indulgence, and not of him who claims of right ; whereas if a bond were to be payable on Sunday, the debtor would have till the close of Monday, to pay it. Some of the cases appear to turn on this distinction.

Formerly it was held, in Massachusetts, that unless a promissory

note expressed grace, it was payable without grace; now it is otherwise by statute. Whether a note, expressed to be payable in thirty days, without grace, is considered due on demand on the thirtieth day after the day of the date, it is not now necessary to decide; though we are inclined to think that such was the rule formerly, when notes were not entitled to grace.

The first case of which a report is published, and which is directly in point, is a *nisi prius* decision of Chief Justice *Parsons*, and is reported in an American edition of Chitty on Bills, p. 225, note *y*, published in 1809, and edited by Mr. Story, now Mr. Justice *Story*, of the Supreme Court of the United States, that of *Park v. Page*, Suffolk, November term, 1808. He says, "the note is due on the last day of grace, and if payment is refused, the maker may be sued on that day." I have examined the record of that case, and find that it was a suit by the indorsee against the indorser of a promissory note, dated 7 July, 1807, payable at sixty days with customary grace. The last day of grace was therefore the eighth of September. The writ is dated on the eighth of September, and was served by an attachment of real estate, at eleven o'clock on that day. To this opinion at *nisi prius*, no exception appears to have been taken, and parties and counsel acquiesced. The only difference between the case thus appearing, and the note cited is, that the action was against the indorser and not against the maker. But if an action would lie against the indorser, who is only provisionally liable on the default of the maker, *a fortiori*, as it seems, would it lie against the maker, who is the principal debtor. This edition of Chitty, by Mr. Justice *Story*, was extensively in use in this Commonwealth, for many years, amongst lawyers and merchants, and was regarded as high authority on the law of negotiable bills and notes.

The case of *Henry v. Jones*, 8 Mass. 453, decided in 1812, appears to me to have a strong application to the point in question. It was a suit against an indorser, on a note dated March 4, 1809, payable in sixty days; and, as the law then stood, was not entitled to grace. The question was, whether the day of the date should be excluded from the computation of the sixty days; if it should be, the note was at maturity on the third of May; if included, it was on the second. The note was presented to the maker on the second, and payment refused, and notice was given to the indorser at a very early hour on the morning of the third,

and payment not being made, a suit was then commenced. The Court held that the day of the date should be excluded, and from there being no grace, the third of May was the last day of the sixty days' credit stipulated for by the contract. The Court, in concluding their judgment say: "No action lies against the indorser, until after demand made *on* the day of the maturity of the note. In this case the demand was made on the day preceding, and not on the day fixed by the parties for the payment." Here, it will be perceived, the rule was prescribed, as well when the note was payable without grace, as when it is with grace; and it is payable on demand, on the last of the days specified in the note. Otherwise, the note in question would not have been demandable till the fourth.

This case is recognized and confirmed, as to a demand on the day of maturity, in *Farnum v. Fowle*, 12 Mass. 89.

But the case in which the point was directly decided, and a case which received great consideration, is that of *Shed v. Brett*, 1 Pick. 401. Several other questions were considered, and the case underwent great discussion. The action was commenced against the indorser, on the last day of grace, after a demand on the promisor, and notice put in the post-office for the indorser, who lived in another town, and held well to lie. The point, that all parties are in default, and liable to an action on the last day of grace, after demand and refusal to pay, seems rather to have been taken as a well-settled rule, than an open question. The Court, in giving judgment, say that the right of action accrues against the indorser of a note, when the maker refuses to pay.

The case of *N. E. Bank v. Lewis*, 2 Pick. 125, goes on the same ground. The action was against the indorser, and commenced on the last day of grace, and it was conceded that if the notice had been given to the indorser before the service of the writ, which might have been done in a few minutes, the action might have been sustained. The case was decided on a distinction between the case where the parties live in the same and in different towns. In the latter case, putting a letter in the post-office is held sufficient constructive notice, although it cannot by possibility have reached the indorser by the course of the mail. And the point in this case was, that if the notice precedes the suit ever so short a time, as if the officer go with the notice in one hand, and the writ in the other, it will be sufficient. This is an express declaration, that an action will lie after a default on the last day of grace.

The case of *City Bank v. Cutter*, 3 Pick. 414, is quite decisive of the same point. In that case, which was against an indorser, the defendants pleaded a tender on the day after the last day of grace. If the promisor and indorser had to the last hour of the last day of grace to make payment, there was no default till the day after; and as there can be no fraction of a day in such case, a tender on that day would be a complete performance of the contract, and a good bar to the action. The Court, in overruling the plea, say: "Our doctrine, as established in the case of *Shed v. Brett*, and indeed always practically recognized is, that the suit may be brought on the very day the note becomes due, after demand and notice, for there is then a breach of the promise. If the note is not paid during the business hours of the day, if the money is to be paid into a bank, a right of action has accrued."

The same doctrine is recognized and declared in *Boston Bank v. Hodges*, 9 Pick. 420. The Court, on dealing with an argument of the plaintiff, that the note being due on the ninth of May, the last day of grace, a demand and refusal to pay on any part of that day, with immediate notice to the indorser, will give a right of action against the latter, say: "This is true, when there is an actual demand upon the maker according to the general rule of law." But the case was decided against the plaintiffs, on the ground that they had neither conformed to the general rule of law, nor to the substituted course established by their own usage.

The principle I am stating was again recognized in *Church v. Clark*, 21 Pick. 310. The note was made payable at a bank, and the suit was commenced against the maker at one minute after twelve o'clock at night, being the morning of the last day of grace. *Held*, that it would not lie. The Court again repeat the general rule, that a note is payable at any time on demand on the last day of grace, or day it becomes due. But such a rule may be modified by the terms of the note; and making a note payable at a bank, is making it payable within usual banking hours.

From this view of the cases decided in Massachusetts, it seems to have been uniformly held, that on demand and refusal of payment by the maker, at any reasonable time on the last day of grace, the note is due and payable; that if not then paid an action may be immediately commenced against the maker, and after actual or constructive notice to the indorser, against him. And as stated by Chief Justice *Parker*, in 3 Pick. 418, this rule seems to have been always practically recognized.

This point has been decided in the same way in Maine. It is there held, that bills and notes are payable on demand, at any reasonable hour, on the day they fall due, and if not then paid, the acceptor or maker may be sued, and also the drawer and indorser, after notice. *Greeley v. Thurston*, 4 Greenl. 479; *Flint v. Rogers*, 3 Shepl. 67. It is a little remarkable, as mentioned by Mr. Justice *Weston*, that there is no direct English authority upon this point.¹ There appears to be no case in which it has been decided, either that an action may or cannot be commenced on the last day of grace, or day the note becomes due. The general rule in regard to payment of debts, for rent, on bond, for goods sold on credit or otherwise, is, that the debtor has till the last hour of the day in which to make payment: *Webb v. Fairmaner*, 3 Mees. & W. 473; but the case of negotiable bills and notes is uniformly treated as an exception. All the authorities hold, that a foreign bill must be demanded on the last day of grace, and, if not paid, must be noted for protest: and the authorities are equally uniform, that if not thus paid on demand, on the last day, by the acceptor or maker, they may be treated as dishonored, and notice may be immediately given to the drawer and indorsers, and they will be held liable. *Lefley v. Mills*, 4 T. R. 170. In this case, Mr. Justice *Buller* lays down the rule very explicitly, and it seems to have been subsequently followed. He states the rule to be, that if not paid on demand, on the last day, the bill is dishonored, the parties are in default, and the bill may be, and, in case of a foreign bill must be, protested on that day, although notice will be seasonable if given the following day. *Burbridge v. Manners*, 3 Camp. 193; *Ex parte Moline*, 1 Rose. Bankr. Cas. 303; s. c., 19 Ves. 216. It was there held, that demand on the acceptor at eleven o'clock, and notice of non-payment to the drawer the same morning, was good, and warranted the proof of a debt against the drawer, who had become bankrupt.

The rule is uniformly laid down by the text-writers, that the bill must be presented for payment on the last day of grace. Bayley, Bills, 126; Chitty, Bills, 365. The latter writer seems to consider the rule established, that the contract of the maker of a note or acceptor of a bill, is to pay on demand on the appointed day, and if payment be not made on such demand, the contract is broken, and the holder may treat the bill as dishonored.

¹ See *Castrique v. Bernabo*, 6 Q. B. 498, note, *post*, 492.

In a late work, Byles on Bills, it is stated, p. 131, that the acceptor of a bill, whether inland or foreign, or the maker of a note, should pay it on a demand made, at any time within business hours, on the day it falls due, and if it be not paid on such demand, the holder may instantly treat it as dishonored. But the acceptor has the whole of that day within which to make payment; and though he should, in the course of that day, refuse payment, which entitles the holder to give notice of dishonor, yet if he subsequently, on the same day, makes payment, the payment is good, and the notice of dishonor becomes of no avail.

This writer cites *Hartley v. Case*, 1 Car. & P. 556, 676; s. c., 4 Barn. & C. 339, 341. The point was made in that case, that notice could not be given on the day the note becomes due; but the case went off on another ground, and no opinion was given on this question.

The passage cited appears contradictory to itself, inasmuch as it declares that the note is due and payable on demand on the last day of grace, and is dishonored if not then paid, and yet that the maker and acceptor have the whole day to pay it in. It would seem that there could be no dishonor, unless the maker had failed to comply with his contract; and if he has failed to comply with his contract, then, by a general rule of law, the holder has his remedy by action.

Perhaps the state of the law upon this point may be accounted for by a remark made in Chitty on Bills, 36, who, after saying that notice of dishonor may be given on the same day, adds, it is not usual or necessary to give notice of non-payment before the following morning, and therefore there can be no objection to the allowance of the whole day on which the bill becomes due, to pay it in. It is probable; therefore, that though the holder may have a strict right to proceed in all respects as upon a dishonored bill on the last day, after demand, refusal, and notice, yet it is so far the general practice to postpone notice and other proceedings till the day following, that it is regarded amongst merchants as a right. That it seems so to have been understood by men of business, appears by a remark of Mr. Justice *Buller*, in *Colkett v. Freeman*, 2 T. R. 59, 61, and also by an *obiter dictum* of *Bolland*, B. in *Webb v. Fairman*, 3 Mees. & W. 473, 474. But the case of negotiable bills and notes was not then under consideration.

No doubt there is a prevailing understanding in England, that

the maker or acceptor has, by right or by courtesy, the whole of the last day to make payment in, and if it is so in fact paid or tendered, there would be little occasion for the holder to insist on his right of action, and decline receiving payment; and so no case has arisen in which it has become necessary to decide that precise question. Possibly it may be considered, that the holder has a right to treat the bill as dishonored, after demand and refusal, and even to commence an action, subject to be defeated and barred in case the maker should pay the amount due, at any time on the last day of grace; though it is difficult to perceive how the holder can have a perfect right to treat the note as dishonored by breach of the contract, and, at the same time, that the acceptor can have a perfect right, by payment of the bill, to perform his contract and save himself from the consequences of such breach. In *Hartley v. Case*, 1 Car. & P. 556, already cited. *Abbott, C. J.*, on a motion to show cause, says: "I think the notice of dishonor, given on the day on which the bill is payable, will be good or bad, as the acceptor may, or may not, afterwards pay the bill. If he does not afterwards pay it, the notice is good; and if he does, it of course comes to nothing."

This certainly implies that after non-payment on demand, on any part of the last day, there is a breach of the contract of the maker, and no further demand is necessary to complete the holder's right against the maker, acceptor, and indorsers. But whether, after such breach and before the close of the day, an action might be commenced against either, does not appear by this case, nor, as we believe, by any case decided in England.

The only decided case opposed to the opinion which we have adopted, and one entitled to great respect, is that of *Osborn v. Moncure*, 3 Wend. 170.¹ In this case, which was an action by the payee against the maker of a note, demand was made on the last day of grace, and, payment being refused, a suit was commenced at three o'clock on the same day. The Court were of opinion that a demand on the maker should be made on the third day of grace, and, on refusal, the holder might treat the bill as dishonored, so far as immediately to give notice to the indorser; yet that the maker has the whole day to pay it in, if he thinks proper to seek the holder. They rely upon the general rule applicable to the case of other debts, that the debtor has to the last

¹ *Post*, p. 493.

instant of the day to make payment, and they consider that in this respect there is no distinction in case of negotiable bills and notes.

It had been frequently held in the courts of New York, that demand must be made on the last day of grace, as well on inland bills and promissory notes as on foreign bills; and if not then paid, the holder might treat them as dishonored and notify the drawer and indorsers. *Jackson v. Richards*, 2 Caines, 344; *Corp v. M'Comb*, 1 Johns. Cas. 328.

Indeed the rule seems to be settled by all the authorities, English and American, that a demand must be made on the maker or acceptor, within reasonable hours, on the day of maturity, and when the bill or note is in a bank, which has certain fixed and known hours for being open for business, those will be construed to be reasonable hours; that if the bill or note is not paid on demand, it is dishonored, and notice may be immediately given to the drawer and indorsers, and, without further demand or notice, they will be legally bound to make payment. *Tindal v. Brown*, 1 T. R. 167, affirmed in Ex. Ch. 2 T. R. 186, note; *Bussard v. Levering*, 6 Wheat. 102. But what shall be the legal consequence of such dishonor, does not appear to have been decided in England. In the case cited, 1 Car. & P. 676, it was argued by counsel, Scarlett, Holt, and Chitty, and not controverted by the Court, because the decision of the case did not require it, that a payment of a bill on the day of maturity, but after actual dishonor, is no better than paying at any time before action brought. And it had long before been decided in *Hume v. Peploe*, 8 East, 168, that a plea of tender after the day of payment, though of all the money due on the bill, was not a good plea in bar, because it did not show a performance of the contract. If then there is a breach of contract, by a non-payment on demand, and the tender after a breach is no bar, it would seem to follow as a necessary legal consequence that an action would then lie.

But upon this point, the courts of different States have come to different conclusions. In New York it has been decided, as in the case cited, that an action will not lie till after the day. In * Maine, as we have already seen, it has been decided that an action will lie, against all the parties, on the day of maturity, after an actual dishonor.

In New Hampshire, *Dennie v. Walker*, 7 N. Hamp. 201, the Court say, it may now be considered as settled, that notice may

be given and suit brought against the indorser on the last day of grace, after demand and notice.

In Maryland, in the case of *Farmers' Bank v. Duvall*, 7 Gill & Johns. 89, the Court say, it is now settled, that demand may be made on the last day of grace, and if payment be not made, the holder may at once treat the note as dishonored, and give notice accordingly. It is not however stated, in terms, that an action may be at once brought.

In South Carolina, in *Wilson v. Williman*, 1 Nott & M'Cord, 440, it was decided on great consideration, by a majority of the Court, that the maker may be sued on the third day of grace after demand.

On the whole, we think the weight of authority is in favor of the conclusion to which we have come; and if it were a new question, it seems to follow, on legal principles, as a fair and legitimate conclusion from the established fact that the contract of the acceptor or maker is broken by a neglect or refusal to pay on demand, within reasonable time, on the last day of grace, that the holder may then have his remedy by action. But in this Commonwealth it is not a new question; it has been settled, we believe, by a uniform series of decisions, and by a long and unbroken course of practice.

It may be proper to make a remark on the point, that some of the cases in Massachusetts manifestly go upon the ground that when a third person has accepted a bill or made a note payable at a bank, or when, from circumstances, it may be inferred that the parties intended that the note should be paid at a bank, the maker has the whole of the usual time of banking hours to pay it. This proceeds upon the ground that the parties have entered into an express or implied agreement, that the note shall be so paid and treated. But when the bank itself has undertaken to pay a sum on any given day, they are bound, like any other promisor, to pay on demand, on that day; and the only difference, in this respect, between a bank and an individual is this, that what would be reasonable time for a demand, in case of individuals, is fixed, in case of a bank, by their known usual hours of being open for business. This is the case in regard to common bank-notes, and it would be most pernicious, in regard to them, to establish a different rule, or raise a doubt respecting it. And a post-note, when, by the lapse of time and the force of the contract, it has become

payable on demand, stands in this respect on the same footing with a bank-note, which is payable on demand in its terms.

The Court are therefore of opinion, that the post-note in question was due and payable when the action was commenced; that the attachment of the plaintiffs was well made, and that the petition must be dismissed.

The rule in Pennsylvania, California, Illinois, Mississippi, and perhaps in England, is different from that laid down above. See *Smith v. Bank of Washington*, *infra*, and note, p. 492.

Shaw, C. J., again says in *Pierce v. Cate*, 12 Cush. 190, 193: "The rule in regard to notes like the one in question is, that the note is payable at any time on actual demand, on the last day of grace; and if such actual presentment and demand are so made and payment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser. But if no presentment or demand is made by the holder upon the maker, the latter is not in default till the end of the business day."

See also the following cases which sustain the above doctrine: *Amidown v. Woodman*, 31 Me. 580; *Veazie Bank v. Wynn*, 40 Me. 62; *Butler v. Kimball*, 5 Met. 94; *Coleman v. Ewing*, 4 Humph. 241; *McKenzie v. Durant*, 9 Rich. 61; *Crenshaw v. McKiernan*, Minor, 295. See *Radolph v. Cook*, 2 Porter (Ala.), 286; *Poole v. Tumbridge*, 2 Mees. & W. 223; *Ex parte Moline*, 19 Ves. 216.

SMITH v. THE BANK OF WASHINGTON.

(5 Sergeant & Rawle, 318. Supreme Court of Pennsylvania, 1819.)

When action may be brought.—Notice to an indorser of non-payment of a promissory note was put into the post-office on the 13th, and by the course of the mail could not reach him before the 19th. Suit was brought on the 16th. *Held*, that it was premature.

THE case is stated in the opinion of the Court.

GIBSON, J. The note which the defendant indorsed to the plaintiff was protested at Washington for non-payment, on the 13th May, and on the morning of that, or the next day, a regular notice of the protest and non-payment was sent by the mail in a letter addressed to the defendant at Burgettstown, near which he lived. According to the course of the mail, which left Washington but

once a week, the notice could not have reached the defendant before the nineteenth, and the present suit was commenced on the sixteenth of the same month. The Court instructed the jury that, the object of the notice being to enable the indorser to arrange his relations with the drawer, it was necessary that notice should be given only in a reasonable time, and that it was not an essential ground of the plaintiff's action; in so far that, if it were received from the post-office by the usual and regular operations of the mail at a period *subsequent to the issuing of the writ*, the suit might, nevertheless, be sustained. In support of this it has been argued that the only use of notice being to warn the indorser that it is necessary for him to look to the drawer, and secure himself if he can, it is a measure requisite only to prevent the previous responsibility of the indorser from being discharged; but that it was not an ingredient in the right of action, which arose immediately on failure to pay by the drawer. But I think it clear that, whether notice be necessary only to enable the indorser to look to his concerns with the drawer, or whether it be to apprise him that he has encountered an immediate instead of a secondary responsibility, it is nevertheless a substantive part of the plaintiff's title to bring the action. This was expressly decided in *Rushton v. Aspinall*, 2 Doug. 679, on great consideration, and, as Lord *Mansfield* tells us, against the wishes of the Court; by whom it was held, in a case exactly like the present, that the want of an allegation of notice of non-payment was fatal, even after verdict; and this on the ground that the title of the plaintiff was not merely set out defectively, but that he had set out *no* title. Now as the plaintiff's title must be complete before suit is brought, it follows the indorser must have notice before the impetration of the writ; or, at least, that some fact be averred and proved, that will excuse the giving of notice altogether; such, for instance, as that the indorser had accepted of a general assignment of the drawer's effects and estate. But the question is, what shall be considered notice. It is not necessary that actual notice be given in every case; but it will be sufficient, and considered constructive notice, if it be left at the house of the indorser or sent by the mail, even though the letter should miscarry. To affect a party with constructive notice is always a harsh measure, and sometimes attended with absolute injustice, though general convenience requires that, in particular cases, it should be resorted to. Still, however, neither policy nor convenience requires that the party should be affected, unless there

was at least a possibility of his having had *actual* notice. From certain facts the law raises a conclusive presumption of actual notice ; but it is not so absurd as to raise it from facts which negative all possibility. that the presumption accords with the truth of the case. The putting a letter into the post-office shall be considered as notice whether it be received or not, provided it might have reached the person to be affected in the regular course of the mail, but it shall be so only from the time at which it ought to have been received. Here there is no question about the reasonableness of the notice ; the material point is the time when it shall be considered as having been received ; for before that time the plaintiff had no right to commence an action. It may be said that if the plaintiff wait until the actual receipt of notice, the indorser may abscond before a writ can be served on him ; but the same reason might be urged in every other case where a plaintiff sues before his cause of action is complete. The notice being for the benefit of the indorser, cannot be dispensed with ; and it would be extremely absurd to suppose that any benefit could flow from it before there was a possibility of its having been received. The judgment must therefore be reversed, and a *venire facias de novo* awarded.

See *Bevan v. Eldridge*, 2 Miles, 353 (1840). In this case, *Stroud, J.*, said : “The practice of including interest in this way [to the end of the third day of grace], is generally, if not universally, adopted by the banks in Pennsylvania. If, then, interest can be charged to the end of the last day of grace, there can be no propriety in treating any party to a note as in default in respect to payment, until that day has expired.”

Castrique v. Bernabo, 6 Q. B. 498 (1844), holds the same rule, that the holder cannot sue the indorser until time has elapsed for notice to reach him. Lord *Denman, C. J.*, said : “The rule of law is that, when there is a doubt which of two occurrences took place first, the party who is to act upon the assumption that they took place in a particular order is to make the inquiry. That is founded on reason. An opposite rule would justify a party in suing where he had not ascertained his right. It follows that the plaintiff in this case has taken upon himself to show that a right of action existed before he commenced his suit ; and, not having done this, he must fail.”

So in Mississippi: *Wiggle v. Thomason*, 11 Sm. & M. 452 ; and in California: *McFarland v. Pico*, 8 Cal. 626 ; and in Illinois: *Walter v. Kirk*, 14 Ill. 555.

OSBORN v. MONCURE AND ROBINSON.

(3 Wendell, 170. Supreme Court of New York, August, 1829.)

When action may be brought.—An action brought against the maker of a promissory note on the third day of grace is premature.

THIS was an action of assumpsit, tried at the New York circuit, in June, 1828, before the Hon. *Ogden Edwards* one of the circuit judges.

The suit was by the plaintiff, as payee against the defendants, as makers of a promissory note. On the third day of grace, payment was demanded at the counting house of the defendants, of a clerk therein (the defendants not being present), who said the note would not be paid. The defendants had stopped payment a few days before. The defendant had a *capias* issued, upon which the defendants were arrested previous to three o'clock P.M. of the third day of grace. The note having been proved, and these facts appearing, the defendant's counsel moved for a nonsuit, on the ground that the action was prematurely brought. The judge refused to grant the motion, and a verdict was rendered for the plaintiff. The defendants excepted to the opinion of the judge, and now moved to set aside the verdict.

SUTHERLAND, J. The only question in this case is, whether the case was prematurely commenced. It is admitted that the writ was served before three o'clock P.M. of the third day of grace, payment having previously been regularly demanded and refused; the defendants having failed some days before. It is not denied that the maker is entitled to the days of grace. 2 Cowen, 766; 8 Cowen, 205, and the cases there cited. Chitty, Bills, 420, 421.

Notice to the indorser on the third day of grace, after a demand upon the maker and his default of payment, is good, although it need not be given until the following day. It being earlier than is required, cannot form any objection on the part of the indorser. 1 Johns. Cas. 328; Chitty, Bills, 362; 3 Camp. 193. The demand upon the maker should be made on third day of grace, and within a reasonable time before the expiration of the day, 2 Caines, 244;

12 Johns. 424; and if he then refuses payment, the holder has done all that is incumbent upon him to do, and may treat it as a dishonored bill, so far as immediately to give notice to the indorser; but still I apprehend the maker has the whole of the day to pay in, if he thinks proper to seek the holder. It is undoubtedly true in relation to other contracts, that the party has until the last instant of the day to make payment; and I perceive no reason for making negotiable paper an exception to the general rule. 3 Bos. & Pul. 602; 4 T. R. 170; Chitty, Bills, 365, note. Mr. Chitty seems to think the rule is differently settled.

The cases of *Crygier v. Long*, 1 Johns. Cas. 393, and *Lawrence v. Bowne*, 2 Johns. Cas. 225, seem to decide, that after appearance and pleading in chief, a defendant cannot object, the suit being upon a note, that it was commenced before the note was due; and it is there said that he should apply to the Court to be discharged from the arrest. But, upon general principles, I do not see how a defendant can be deprived of the benefit of such a defence upon the trial. The plaintiff, under the plea of non-assumpsit, is bound to show a good cause of action *at the time of the commencement of the suit*, and the defendant may give in evidence any thing which shows that the plaintiff had not such cause of action at that time. 1 Phil. Ev. 131. It is well settled that the issuing of the *capias* is the commencement of the suit, and the plaintiffs' cause of action must exist at that time. 3 Johns. Cas. 149; 1 Caines, 69, 72; 3 id. 133; 2 Johns. 346; 3 id. 42; 10 id. 119, and 8 Cowen, 205, where the cases are collected. Mr. Chitty, 1 Chitty, Plead. 443, says, that where a suit is prematurely brought, it is ground of demurrer or nonsuit. This appears to me to be the true rule. I am, therefore, of opinion that the judge ought to have nonsuited the plaintiff.

New trial granted.

The foregoing cases will be sufficient to show the different views that have been entertained by courts of high authority upon a very important branch of the law.

The doctrine of *Osborn v. Moncre* is reaffirmed in *Smith v. Aylesworth*, 40 Barb. 104. Mr. Justice *Johnson*, who delivered the opinion of the Court in this case, said: "The action is brought by the payee, against the maker of the note in question. Of course no demand was necessary in order to charge the defendant. The only question in the case is whether the action, having been commenced after banking hours at the bank where the note was payable, on the last day of grace, is not prematurely brought. This precise question was decided in *Osborn*

v. Moncure, 3 Wend. 170, upon full argument and mature deliberation. That case, like this, was an action between payee and makers, and the action was brought before three o'clock in the afternoon of the last day of grace, but after demand of payment and refusal. The Court unanimously held that the makers had the whole of the third day of grace in which to make payment, and that an action commenced upon the third day, though after demand, was brought prematurely, and could not be maintained. *Sutherland, J.*, who delivered the opinion of the Court, says: 'It is undoubtedly true in relation to other contracts, that the party has until the last instant of the day to make payment; and I perceive no reason for making negotiable paper an exception to the general rule.' It would be difficult to assign any valid reason for any distinction. Negotiable paper, by law, becomes due on the third day of grace, precisely as other contracts do on the day when the term of credit expires according to their date, and not otherwise in any respect, that I am able to perceive. That is the law in regard to such paper, and it is part and parcel of the obligation, precisely as much as though it were written in the note. The only difference between the two cases is, that in this case the note was payable at a bank, while in that case it was payable generally, at no particular place. But in that case demand was actually made before action brought, and no question raised that the demand was insufficient, or in any respect improper. There is no essential difference, therefore, in the two cases. I am aware that the rule is laid down differently in *Chitty on Bills*, which the Court notice in the case referred to.

'Parsons, in his recent work on Notes and Bills, also lays down the rule as follows: 'We are however of opinion that after demand and refusal on that day an action may be at once maintained.' He also says: 'But without such prior demand and refusal, an action commenced on the day of maturity is premature, unless the note is payable at a bank, when it seems that a suit may be commenced after bank or business hours.' 2 Parsons, Notes and Bills, 461, 462. Several cases are cited, decided in other States, to sustain the rule as laid down in the text, though the author admits that the rule may not be positively determined by authority. If it be true, as our Supreme Court has decided, that the maker has up to the last instant of the last day of grace in which to make payment, as part of his contract, I do not see how a demand before that time, or the expiration of the business hours at a bank where the note is payable, can alter the time of the note becoming due and payable. Generally the law does not notice the fractions of a day, and it is difficult to see how the act of a payee or holder, in making demand of payment at any particular hour in the day, or the custom of a bank in closing its doors at a particular hour, is to work a severance of time, so that a note payable on a particular day, and not at any specified hour of such day, shall be both due, and not due, on the same day. Certainly there is nothing in the contract, nor, so far as I am advised, in the mercantile custom, by which a payee by his own voluntary act can shorten the day or the hour of payment. It seems to me our rule is the only safe and consistent one, and that it ought to be followed, especially by this Court. All that is decided in the *Bank of Syracuse v. Hollister*, 17 N. Y. 46, is that a presentment of a note and demand of payment by a notary, of himself, at the bank door after banking hours, and after the bank was closed, was a sufficient presentment to charge an indorser. This only relates to the rule between holder and indorser, and is to the effect that a holder

is not confined to banking hours in making his demand, but may make it at any time in the day, afterwards, provided he can find a proper person at the place, to answer. If this decision has any bearing upon the present case, it is rather against the plaintiff than in his favor. It necessarily holds that the demand was made before the time for the payment of the note had expired. Otherwise the demand could not have been held sufficient to charge the indorser.

“On the whole I am of the opinion that the action was prematurely brought, and that the nonsuit should have been granted.

“The judgment must therefore be reversed, and a new trial ordered, with costs to abide the event.”

Whether the above is or is not sound as to paper payable at bank, — and our opinion is that it is not, — it is certainly the true doctrine, as it seems to us, in the case of paper payable generally. The maker or acceptor by analogy to all other branches of contract, and, as we think, by the weight of authority upon this point, and by reason, should have in this case until the close of the third day of grace within which to make payment. There can then be no breach during that day; and an action before the fourth day would be premature.

The circumstance of refusal is considered in some of the cases as sufficient to warrant suit before business hours have expired, in the first case above stated, and before the close of the third day, in the second; but this is not satisfactory. The maker or acceptor, notwithstanding his refusal, may change his mind, and tender the money within the time allowed him; and shall the holder by excessive zeal, perhaps by malice, throw upon him the burden of costs by suing within that time? Such a rule would be unreasonable and productive of no good.

If the above is sound doctrine respecting the party primarily liable, *a fortiori* will it apply to the case of an indorser. But we apprehend that the Pennsylvania rule has gone too far in this direction, in requiring the holder to wait until the indorser shall have had time to receive notice. He should not sue until after a breach of the contract, it is true, — and we have indicated when that occurs, as we understand it, — but as soon as the contract is broken and notice is sent, his title has accrued against the indorser. Chief Justice *Parsons* forcibly states this view in *Shed v. Brett*, 1 Pick. 401, 411. He says: “The argument is, that notice of the non-payment is essential to the plaintiff’s right of action; that it is necessary to aver it in the declaration as a fact existing; and that as the case shows this could not be true, the plaintiff has failed in an essential point. But this argument proceeds upon the ground that there must be an actual reception of notice before the plaintiff can sue; and this is certainly fallacious. If the putting the letter into the post-office is notice in itself, which we have shown, then it was given before the commencement of the suit. And it would be mischievous to decide otherwise; for every plaintiff’s right of action would commence at different times according to the distance of the party sued; and the time of suing must be conjectured, as it cannot be known when the notice will be actually received. Besides if the object of waiting be to give the party opportunity to take up the note, there must be a sort of double usance; for the holder must wait till his letter is received, and for a reasonable time afterwards for the party receiving it to come and pay the money. Who would take a bill or note remitted from New Orleans, if this doctrine be correct? And if the parties liable be beyond sea, such instruments would be mere waste paper. If the bill could not

be accepted, or the indorsed note not paid, the unfortunate holder, with property belonging to the drawer or indorser before his eyes, must remain an idle spectator of the scramble of other creditors for it, or suffer it to be withdrawn by the debtor himself without the power of arresting it. This cannot be sound doctrine; an averment of notice will be sufficiently proved, by showing that the steps necessary to give the notice have been taken; if subsequently received, it will relate to the time when it was sent; if never received, the fact of having put it in the proper train is enough."

It will be observed that the doctrine combated above is a step in advance of the position taken in Pennsylvania; the doctrine of that State requiring the holder only to wait until sufficient time has elapsed for notice to reach the indorser, and not until an actual reception of the notice. But the reasoning of Chief Justice *Parsons* overturns this position also. In every case under the rule in Pennsylvania, the time must be uncertain when the holder can sue the indorser or drawer, and the probability of satisfying his claim by execution will grow more and more remote in proportion as the distance increases over which the notice must travel; at least in all cases where the debtor has vigilant creditors, and especially if he himself possesses a disposition to take advantage of the holder by removing or secreting his property.

EVIDENCE.

WELLS v. WHITEHEAD.

(15 Wendell, 527. Supreme Court of New York, July, 1836.)

Production. Bill drawn in sets. — In a suit against the indorser of a bill of exchange drawn in sets, the defendant may require the production of the identical one of the set dishonored.

ASSUMPSIT against the indorser of a bill of exchange drawn in sets. The plaintiff declared on the first of the set, but without producing or accounting for the non-production of the third, which was the one actually dishonored.

NELSON, J. Two objections were taken in this case to the plaintiff's right to recover, which were overruled by the circuit judge : 1. That the suit being against an indorser, on a protest for non-acceptance of a bill of exchange drawn in parts, it was incumbent upon the plaintiff to produce at the trial the identical bill, or number of the set that was protested, or account for its absence ; and 2. That sufficient evidence was not given to establish the fact that the defendant had been duly notified of the non-acceptance, or that due diligence had been used for that purpose.

The law on this point is correctly laid down by Chancellor *Kent* in his Commentaries. He says : " If several parts, as is usual, of a bill of exchange be drawn, they all contain a condition to be paid, provided the others remain unpaid, and they collectively amount to one bill, and a payment to the holders of either is good, and a payment of one of a set is payment of the whole. The drawer or indorser, to be charged on non-acceptance or non-payment, is entitled to call for the protest, and the identical bill or number of the set protested, before he is bound to pay ; and it would be sufficient to produce it at the trial, or account for its absence. His rights attach to the bill dishonored, and he is entitled to call for it. He

may want it for his own indemnity, and without it he might be exposed to claims for some *bona fide* holder, or person who had paid *supra protest* for his honor." 3 Kent, Com. 109. As to the right of the drawer or indorser to call for the protest, the chancellor must be considered as referring to a *foreign bill*, no protest being necessary in respect to a domestic or inland bill.

Where the bill has been protested for non-acceptance, any person may accept it *supra protest* for the honor of the bill, the drawer, or any particular indorser. This usage promotes the negotiation of it when the drawer's credit is suspected, and may save the character and prevent the prosecution of some of the parties, in case the drawee cannot be found, is not capable of accepting, or refuses. Chitty, Bills, 241; 3 Kent, Com. 87. The person accepting *supra protest* subjects himself to the same obligations as if the bill had been directed to him; and if he accepts for the honor of the drawer or indorser, though without his knowledge, he has a remedy against such persons and all others liable to them, for his responsibilities assumed, the same as if he acted under their direction. Chitty, 243; 3 Kent, Com. 87; 1 Esp. N. P. 113; 1 Ld. Raym. 575. If he takes up the bill for the honor of the indorser, he stands in the light of an indorsee paying full value for it, and has the same remedies to which he would be entitled against all prior parties. From this doctrine it seems to me clearly to follow, that if *the bill* presented to the payees in this case had been accepted by a friend of the defendant for his honor, after the refusal by the payees to accept, the defendant would be bound to indemnify him, notwithstanding a recovery, on the number of the set produced at the trial. It is true, as a general rule, payment of one of the set is payment of the whole; but if the drawer or indorser is entitled to call for the *identical bill dishonored* before he is obliged to pay it, the omission to do so would subject him to the charge of negligence, and make him, notwithstanding, accountable to the persons who had accepted it for his honor. Indeed, if he stands in the light of an indorsee for the value of a bill transferred before due, there is no escape from this liability. His security, therefore, requires that he should be allowed to call for the bill protested before a recovery is permitted to be had against him.

The view of the law as taken by Chancellor *Kent* is supported by several approved authorities. Chitty, Bills, 387; 2 Stark. Evid.

142: 1 Saund. Pl. & Ev. 275, 318; 4 Petersdorff, Abr. 536. According to these authorities, all the sets should be produced in case of a *foreign* bill. In the case of *Kenworthy v. Hopkins*, 1 Johns. Cas. 107, to which Chancellor *Kent* refers to sustain his qualification of this rule, the *second* of the set was declared on, which was the one accepted and the only one produced at the trial. It was there objected that notice of protest for non-payment was insufficient, on the ground that the identical bill protested had not accompanied it. It was accompanied by one of the set that had not been accepted or protested, and payment was refused on that ground. The Court decided that the holder had a right to retain the bill accepted, as he might want it to proceed against other parties, and intimated that the production or presentation of it was essential only when payment was demanded. The marginal note of that case does not correctly state the point decided; nor did the facts call for an examination or decision of the question as there stated. The note would sustain the ruling of the judge in this case: it is there laid down that, where one of a set of three bills of exchange on London was protested for non-payment, it was held an action might be maintained here against the indorsers on one of the set not protested, with the protest of the other. In truth the point particularly examined in that case is no longer of any importance, because the better opinion now is that a copy of the bill and protest need not accompany the notice in the case of a *foreign* bill. Notice of the fact of non-acceptance or non-payment is sufficient. *Chitty, Bills*, 217, and cases there cited; 3 *Kent, Com.* 93, 109; 3 *Camp.* 334; 2 *Esp. N. P.* 511; 10 *Mass.* 5, and note; 1 *Selw.* 273; 4 *Esp. N. P.* 48. Production of the protest at the trial is all that is necessary.

Whether the bill in this case be considered a *foreign* or *inland* bill can make no difference, so far as the material question involved is concerned. The rule of evidence should be the same in both cases as to the production on the trial of the *identical bill presented*. Either may be accepted *supra protest*, and the reasons for the production or accounting for the absence of the protested bill on the trial, are alike applicable in both cases. In *Buckner v. Finley* and *Van Lear*, 2 *Peters*, 586, bills of exchange drawn in one State on persons residing in another, were held to partake of the character of foreign bills. It had been before held, in *Townsley v. Sumrall*, *ib.* 170, that such bills were to be deemed foreign in respect to the

protest and proof of the dishonor. A different opinion had been expressed by Mr. Justice *Van Ness*, in *Miller v. Hackley*, 5 Johns. 375. It was not, however, the point in the case, and should not, perhaps, be considered as conclusive upon the Court. When the question arises directly for consideration, it may be proper to review it. The convenience of trade and commerce preponderates strongly in favor of viewing such bills as foreign, so far, at least, as respects the protest and proof, as then the certificate of the notary, under the seal of office, is evidence of the protest in the foreign State without any auxiliary support, and is so received in all courts, according to the usage and custom of merchants.

New trial granted, costs to abide the event.

On the second point, respecting diligence, the decision was in favor of the plaintiff. That subject has already been considered, under PRESENTMENT AND DEMAND FOR PAYMENT.

Upon the question of production it has been held in the Supreme Court of the United States that in an action by the holder on the particular one of the set which was dishonored, the defendant cannot require the plaintiff to produce the other numbers of the set, or account for their non-production. *Downes v. Church*, 13 Peters, 205. The principal case was before the Court. Mr. Justice *Story*, who delivered the opinion in *Downes v. Church*, said: "This is the case of a certificate of division of the judges of the Circuit Court for the district of Mississippi. The action was assumpsit, founded on the second part of a foreign bill of exchange, by the indorsee against the indorser for non-acceptance. The plaintiffs declared upon the second of the set of exchange, which second of the set was protested for non-acceptance, and the same, with the protest attached thereto, was read to the jury. Whereupon a question arose, whether the plaintiffs could recover upon the said second of exchange without producing the first of the same set, or accounting for its non-production; upon which question the judges were opposed in opinion. And the same has been accordingly certified to this Court under the Act of Congress.

"We are of opinion that the plaintiffs are entitled to recover upon the second of the set without producing the first, or accounting for its non-production. No authority has been referred to which is exactly in point, nor are we aware that the question has ever been judicially decided. Mr. Starkie, in his work on Evidence, part 4, p. 228, 1st ed., has said: 'In the case of a foreign bill drawn in sets, both the sets should be produced.' But for this proposition he has cited no authority. The question must, then, be decided upon principle. The object of drawing a foreign bill in sets is for the convenience of the payee, or other holder, to enable him to forward the same for acceptance by different conveyances, and thus to guard against any loss, by accident or otherwise, which might occur if there were but a single bill. But from the very frame of the set, if one is paid or discharged by the acceptor, or other party liable on it, he is ordinarily discharged from the others, since each part contains a condition that it shall be

payable only when the others remain unpaid. Now, when one of the set is protested for non-acceptance, and due notice is given to an indorser, and on the trial of an action brought against him by the indorsee, the same bill of the set on which the protest is made is produced, that is *prima facie* proof of his being responsible thereon. Either of the set may be presented for acceptance, and, if not accepted, a right of action presently arises upon due notice against all the antecedent parties to the bill, without any others of the set being presented; for it is by no means necessary that all the parts should be presented for acceptance before a right of action accrues to the holder. Under such circumstances, it is properly a matter of defence on the other side, to show either that some other bill of the set has been presented and accepted, or paid; or that it has been presented at an earlier time and dishonored, and due notice has not been given; or that another person is the proper holder, and has given notice of his title to the party sued; or that some other ground of defence exists, which displaces the *prima facie* title made out by the plaintiff. The law will not presume that the other bills of the set have been negotiated to other persons, merely because they are not produced. And the indorser is not put to any hazard or peril by the non-production of them; since, like the acceptor, if he once pay the bill, without notice of any superior adverse claim, by a negotiation of another of the set to another party, he will be completely exonerated. On the other hand, great inconveniences might arise from compelling the plaintiff to produce the other parts of the set, or to account for their non-production, as he might not be able satisfactorily to prove that they had not been negotiated, or that they had been lost. In short, if the plaintiff, before he could recover, were required to produce or to account for all the parts of the set, he would be obliged, in every case where the bills had been transmitted by different conveyances abroad, to arm himself with proofs of every stage of their route and progress, until they should come back again into his hands, as preliminaries to his right to recover upon their being dishonored. Such a requirement would create most serious embarrassments in all commercial transactions of this sort; and instead of bills drawn in sets being a public convenience, they would be greatly obstructed in their negotiability, since the rights and the remedies of the holder might be materially impaired thereby. We are therefore of opinion that the question upon which the judges of the Circuit Court were opposed, ought to be answered in the affirmative, and we shall send a certificate to the Court accordingly."

It may be worthy of note that no counsel appeared for the defendant in this case. Upon the general subject of production, see Chitty, Bills, 625.

It is a general rule that the paper sued upon must be produced, or its absence accounted for; and this rule is not changed by a statute which dispenses with proof of signatures unless their genuineness be denied on oath. *Sebree v. Dorr*, 9 Wheat. 558; *Matossy v. Frosh*, 9 Texas, 610. See also *Shearm v. Burnard*, 10 Adol. & Ellis, 593; *Read v. Gamble*, ib. 597, note; s. c. 5 Nev. & M. 433; *Cunliffe v. Whitehead*, 3 Dowl. 634.

BANK OF THE UNITED STATES, Plaintiffs in Error, v. JOHN O. DUNN. Defendant in Error.

(6 Peters, 51. Supreme Court of the United States, January, 1832.)

Evidence to vary liability of indorser. — The indorser of commercial paper will not be permitted to show that his indorsement was intended to be merely formal; and that he was informed by the payor that he would incur no responsibility by indorsing the paper, as its payment had been secured by a pledge of stock.

THE case is stated in the opinion of the Court.

McLEAN, J. In the Circuit Court for the District of Columbia, from which this cause is brought by writ of error, the plaintiffs commenced their action on the case against the defendant, as indorser of a promissory note. The general issue was pleaded, and at the trial the plaintiffs read in evidence the following note: —

“\$1000. Sixty days after date, I promise to pay John O. Dunn, or order, one thousand dollars, for value received, negotiable and payable at the United States Branch Bank in Washington.

“JOHN SCOTT.”

On the back of which was indorsed,

“OVERTON CARR,

“J. O. DUNN.”

The signatures of the parties were admitted, and proof was given of demand at the bank, and notice to the indorsers.

The defendant then offered as a witness, Overton Carr, an indorser of said note, who testified that before he indorsed the same, he had a conversation with John Scott, the maker, and was informed by him that certain bank stock had been pledged, or was to be pledged, by Roger C. Weightman, as security for the ultimate payment of the said note, and that there would be no risk in indorsing it. That the witness then went into the room of the cashier of the plaintiffs' office of discount and deposit at Washington, and found there the said cashier, and Thomas Swann, the president of the said office, to whom he communicated the conversation with Mr. Scott, and from whom he understood, upon inquiry, that the names of two indorsers residing in Washington were required upon the said note, as matter of form: and that he would incur no re-

sponsibility (or no risk) by indorsing the said note. He does not recollect the conversation in terms, but such was the impression he received from it.

That he went immediately to the defendant and persuaded him to indorse the note, by representing to him that he would incur no responsibility or no risk in indorsing it, as the payment was secured by a pledge of stock; and to whom he repeated the conversation with Mr. Scott, and said president and cashier. That no person was present at the conversation, the terms of which he does not recollect; but that the impression he received from this conversation with the aforesaid president and cashier, and with the said Scott, and which impression he conveyed to the defendant was, that the indorsers of said note would not be looked to for payment, until the security pledge had been first resorted to; but that the said indorsers would be liable in case of any deficiency of the said security to supply the same. That neither this witness nor Mr. Dunn was, at the time, able to pay such a sum, and that both indorsed the note as volunteers, and without any consideration, but under the belief that they incurred no responsibility (or no risk), and were only to put their names to the paper for form sake.

To which evidence the plaintiffs, by their counsel, objected; but the Court permitted it to go to the jury.

The plaintiffs examined as a witness Richard Smith, the cashier, whose testimony was overruled; and then Thomas Swann, the president of the bank, was offered as a witness and rejected; it appearing that they were both stockholders in the bank. To this decision of the Court, a bill of exceptions was taken by the plaintiffs, and exception was also taken to the evidence of Overton Carr.

On this last exception the plaintiffs rely for a reversal of the judgment of the Circuit Court. And first, the question as to the competency of this witness is raised.

He is not incompetent merely from the fact of his name being indorsed on the bill. To exclude his testimony, on this ground, he must have an interest in the result of the cause. Such interest is not apparent in this case; and any objection which can arise from his being a party to the bill, goes rather to his credibility than his competency.

But it is a well-settled principle, that no man who is a party to a negotiable note shall be permitted, by his own testimony, to invalidate it. Having given it the sanction of his name, and thereby

added to the value of the instrument by giving it currency, he shall not be permitted to testify that the note was given for a gambling consideration, or under any other circumstances which would destroy its validity. This doctrine is clearly laid down in the case of *Walton et al.* assignees of *Sutton v. Shelley*, reported in 1 T. R. 296, and is still held to be law, although in 7 T. R. 56, it is decided that in an action for usury, the borrower of the money is a competent witness to prove the whole case.

Several authorities are cited by the plaintiff's counsel to show that parol evidence is not admissible to vary a written agreement.

In the case of *Hoare et al. v. Graham et al.*, 3 Camp. 57, the Court lay down the principle that, "in an action on a promissory note or bill of exchange, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it should be renewed and payment should not be demanded when it became due."

This Court, in the case of *Renner v. The Bank of Columbia*, 9 Wheat. 581,¹ in answer to the argument that the admission of proof of the custom or usage of the bank would go to alter the written contract of the parties, say: "If this is the light in which it is to be considered, there can be no doubt that it ought to be laid entirely out of view; for there is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement."

Parol evidence may be admitted to explain a written agreement where there is a latent ambiguity, or a want of consideration may be shown in a simple contract; or, to defeat the plaintiffs' action, the defendant may prove that the note was assigned to the plaintiffs, in trust, for the payor. 6 Mass. 432.

It is competent to prove by parol that a guarantor signed his name in blank, on the back of a promissory note, and authorized another to write a sufficient guarantee over it. 7 Mass. 233.

To show in what cases parol evidence may be received to explain a written agreement, and where it is not admissible, the following authorities have been referred to: 8 Taunt. 92; 1 Chitty, 661; Peake's Cases, 40; Gilbert, 154.

On the part of the defendant's counsel it is contended, that between parties and privies to an instrument not under seal, a want of consideration, in whole or in part, may be shown. That the

¹ *Ante*, 297.

indorsement in question was made in blank, and that it is competent for the defendant to prove under what circumstances it was made. That if an assurance were given at the time of the indorsement that the names of the defendant and Carr were only required as a matter of form, and that a guarantee had been given for the payment of the note, so as to save the indorsers from responsibility, it may be proved, under the rule which permits the promisor to go into the consideration of a note or bill between the original parties.

In support of this position, authorities are read from 5 Serg. & Rawle, 363, and 4 Wash. C. C. 480. In the latter case, Mr. Justice *Washington* says: "The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was therefore properly admitted." The decision in 5 Serg. & Rawle was on a question somewhat analogous to the one under consideration, except in the present case there is no allegation of fraud, and the decision in that case was made to turn in part, at least, on that ground.

In Pennsylvania, there is no Court of Chancery, and it is known that the courts in that State admit parol proof to affect written contracts, to a greater extent than is sanctioned in the States where a chancery jurisdiction is exercised. The rule has been differently settled in this Court.

The note in question was first indorsed by the defendant to Carr, and by him negotiated with the bank. It was discounted on the credit of the names indorsed upon the note. This is the legal presumption that arises from the transaction; and if the first indorser were permitted to prove that there was a secret understanding between himself and his assignees that he should not be held responsible for the payment of the note, would it not seriously affect the credit of this description of paper? Might it not, in many cases, operate as a fraud upon subsequent indorsers?

The liability of parties to a bill of exchange, or promissory note, has been fixed on certain principles which are essential to the credit and circulation of such paper. These principles originated in the

convenience of commercial transactions, and cannot now be departed from.

The facts stated by the witness Carr are in direct contradiction to the obligations implied from the indorsement of the defendant. By his indorsement, he promised to pay the note at maturity, if the drawer should fail to pay it. The only condition on which this promise was made was, that a demand should be made of the drawer when the note should become due, and a notice given to the defendant of its dishonor. But the facts stated by the witness would tend to show that no such promise was made. Does not this contradict the instrument? and would not the precedent tend to shake, if not destroy, the credit of commercial paper? On this ground alone the exception would be fatal; but the most decisive objection to the evidence is, that the agreement was not made with those persons who have power to bind the bank in such cases. It is not the duty of the cashier and president to make such contracts; nor have they the power to bind the bank, except in the discharge of their ordinary duties.

Upon a full view of the case, the Court are clearly of the opinion, that the evidence of Carr should have been overruled by the Circuit Court; or they should have instructed the jury that the facts proved were not in law sufficient to release the defendant from liability on his indorsement. The judgment of the Circuit Court must, therefore, be reversed, and a *venire de novo* awarded.

See the following cases.

K. AND E. TOWNSEND v. BUSH.

(1 Connecticut, 260. Supreme Court, November, 1814.)

Competency of party to commercial paper to prove it invalid.—A party to a negotiable instrument, who is divested of interest, is competent to prove usury in the inception of the paper.

THIS was an action of assumpsit against Bush as acceptor of a bill of exchange drawn by Ebenezer and Atwater Townsend, and payable to the plaintiffs or order. There was also a count for money paid, laid out, and expended for the defendant's use. The cause was tried at New Haven, August term, 1814, before *Swift*,

Brainard and Baldwin, JJ. On the trial, the defendant admitted the drawing and acceptance of the bill, as stated in the declaration. His defence was usury under the following circumstances. E. and A. Townsend, applied to W. Leffingwell in New York for the loan of a sum of money. Leffingwell agreed to loan them the money at twelve per cent interest, upon their giving him a bill of exchange for the amount, drawn by themselves on the defendant and accepted by him payable to the plaintiffs K. and E. Townsend, and by them indorsed. These terms were complied with; the defendant at the time of accepting the bill, and the plaintiffs at the time of indorsing it, having no notice of the corrupt agreement. Leffingwell indorsed the bill to the Derby Bank, and there procured it to be discounted. When it became payable, the Derby Bank gave due notice to the several parties to the bill; and afterwards commenced a suit against the plaintiffs on their indorsement in the State of New York, and by the judgment of the Supreme Court of that State recovered the amount of the bill with interest and costs, which the plaintiffs accordingly paid. The defendant accepted the bill for the honor of the drawers, having no effects of the drawers in his hands. To prove these facts, the defendant offered the individuals composing the firm of E. and A. Townsend as witnesses; offering also, at the same time, to show, that they had no interest in this suit, being discharged from all liability on the bill under an act of insolvency in the State of New York. The plaintiffs objected to the admission of these witnesses, on the ground that having drawn the bill, and thereby given credit to it, they were incompetent to show that it was invalid on account of usury; and also on the ground that any proof of said corrupt agreement would be irrelevant on this trial. The Court excluded the witnesses, and directed the jury to find a verdict for the plaintiffs; which being accordingly done, the defendant moved for a new trial. This motion was reserved for the consideration of all the judges.

TRUMBULL, J. The principal question in this case is, Whether Ebenezer and Atwater Townsend, the drawers of the bill in question, are admissible witnesses in an action by the plaintiffs as payees of the bill against the defendant as acceptor, to prove that it was executed on an usurious contract, and therefore is void in law.

The rule that no person can be permitted to give testimony to

invalidate any instrument to which he has made himself a party by affixing his signature, in cases wherein he has no interest in the event of the suit on trial, was first adopted in the case of *Walton v. Shelley*, 1 Durn. & East, 296, by Lord *Mansfield*, and the other judges of the King's Bench. He states that "the rule is founded in public policy; that there is a sound reason for it; because every man, who is a party to an instrument gives a credit [to] it; that it is of consequence to mankind, that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it; that it is emphatically right in case of notes, because in consequence of different statutes, two very hard cases have arisen: first, with respect to a gaming note, which, though in possession of a *bona fide* purchaser without notice, is void; and in the case of usury, a note given for an usurious consideration, though in the hands of a fair indorsee, is equally void; and therefore, whenever a man signs these instruments, he is always understood to say, that to his knowledge there is no legal objection to them whatever." He then quotes the maxim of the civil law, *nemo suam allegans turpitudinem est audiendus*, and applies it as conclusive on the present point. The other judges concurred, and established this as a general rule of law.

The English courts soon found the principle was laid down on too broad a scale, and narrowed it in its application, to negotiable instruments only. No new or additional reasons were ever adduced in its support. It was adhered to on the grounds stated by Lord *Mansfield*, and the authority of the decision in that case. But at length, the rule was exploded in the King's Bench, and such a witness determined to be admissible, unless interested in the event of the suit on trial. See *Jordaine v. Lashbrooke*, 7 Durn. & East, 601.

As the decisions of the highest court and ablest judges at Westminster Hall have been thus directly contradictory, and as their principle (notwithstanding the *dicta* of several of the judges in *Allen v. Holkins*, 1 Day's Cases in Error, p. 17, adopting the rule as sound law, and the decision in *Webb v. Danforth*, p. 301, denying its application as to facts subsequent to the execution of the instrument) has never till now come directly in question before the highest courts in this State, it is our duty to decide it according to the general rules and principles of law respecting admissibility of testimony; and if the grounds and reasons in *Walton v.*

Shelley are found to be fallacious, we cannot consider the case and its authority conclusive.

The first ground Lord *Mansfield* takes, is, that every person who signs an instrument, thereby gives it a credit, and can never be admitted to dispute its validity. Before we adopt this principle of universal exclusion and estoppel, we must inquire what credit each several party, by putting his signature upon a negotiable instrument, thereby gives to it, and what obligation he thereby incurs; for each signer stands on a different ground.

The drawer of a bill or [indorser of a ?] negotiable note, acknowledges himself indebted to the payee to the amount of the sum it contains, and engages to pay the damages, in case the bill shall be dishonored, or the note uncollected, without the fault of the payee, or of those to whom it may be indorsed.

The indorser of a bill or note acknowledges his receipt of a valuable consideration, and contracts to pay the sum, in case it cannot be obtained of the drawer.¹

The acceptor acknowledges it to be duly drawn; he is not admitted to deny the handwriting of the drawer; and he contracts to pay the sum according to its contents to the legal holder.

These are the rules and principles of common law as adopted and sanctioned by the courts in this State.

The indorsee or holder of a negotiable security has nothing to do with the transaction between the original parties. See *Jordaine v. Lashbrooke*. Nor has the drawer or acceptor any thing more to do with the contracts between subsequent indorsers and indorseees. Each party is bound only so far as his own obligation extends, and cannot be precluded from denying any fact not acknowledged by his signature. All these contracts are separate and independent. No party by his signature warrants the validity of any contract but his own, or gives any farther credit to the security, or is interested in the event of any suit on the several contracts of other parties, whose names may appear on the instrument. He warrants nothing farther with respect to the validity of the draft, he hangs out no false colors, and is not estopped by his signature from testifying to any facts respecting the instrument, or any legal objections within his knowledge.²

¹ This word "drawer" is of course used for "maker;" and the words "or of the acceptor" should have been added.

² An indorser warrants the genuineness of all prior signatures. See *Story, Promissory Notes*, § 135.

The only fundamental principle of the common law, applicable to the present question, is this, that no man can be a witness in his own cause ; and this rule hath ever been considered as applicable to every case in which he is a party, or is interested, and to no others. It was formerly^holden as well in the English courts as our own, that an interest in the question was a sufficient ground for excluding a witness. It is now settled law in both, that an interest in the event of the suit is the only ground on which he can be rejected ; and that a mere interest in the question does not affect his competency, but his credit with the jury only. But this distinction was not fully settled at the time the case of *Walton v. Shelley* was tried. Justice *Buller*, though he concurred in the principle that no man can invalidate his own security, relied much in his argument on the fact that the witness was interested in the question, because the question put to him was upon the validity of the notes he had indorsed ; although he clearly was not interested in the event of the suit on trial, as it must be uncertain whether he would ever be subjected to a subsequent action on the instrument, was already liable on his signature, and could never give the verdict in evidence in his favor.

The maxim of the civil law, that no man is to be heard who alleges his own turpitude or crime, was never by any court or judge, before Lord *Mansfield*, applied to the inadmissibility of a witness, but only to the rights of the parties in a suit or action. No suitor can support a claim in which the ground or consideration is an unlawful act of his own ; nor can any defendant be heard on a defence grounded on his own unlawful act. But an accomplice in a crime, a fraud, or any illegal transaction, was always an admissible witness, unless immediately interested in the suit. I may further observe, that the term “ turpitude,” can with no propriety be applied to an act, not *malum in se*, but only *malum prohibitum*, by force of some statute, making it penal in some particular country, or jurisdiction.

In *Jordaine v. Lashbrooke*, Lord *Kenyon* says : “ The rule contended for is this : Whatever fraud may have been committed, if the party to the fraud can get on the instrument the name of the person who may be the only witness to the transaction, he will stand entrenched within the forms of law, and impose silence on that only witness, though he be a person of unimpeachable character, and not interested in the cause.” This he denies to be

law. *Grose*, Justice, says: "Let the plaintiff in this case resort to his indorser to recover back the consideration he gave for the bill."

Indeed, if a man sell and indorse a note executed by an infant, or *feme covert*, and void at common law, or void by statute as being usurious, unstamped or a forgery, I see no legal defence he can set up against an action of assumpsit by the indorser, for the money paid on a consideration which has wholly failed. For that is not an action on the bill or note, but rests entirely on the ground that the note is void in law. If such an action can be supported, there is no hardship in the case of an innocent purchaser; he has his remedy. If in any case he is deprived of every legal remedy, no court can have a right, in compassion to the hardship of his situation, to assist him in evading the law by excluding such witnesses, or evidence, as is admissible in all other cases.

The hardship upon the innocent indorsee, which seems so strongly to have influenced the mind of Lord *Mansfield*, is indeed no more than this; by the statutes to which he refers, all bills or notes, where the consideration is money lent on usury or for gaming, are declared void to all intents and purposes whatever; and consequently, the indorsee, whenever he brings his suit on the note or bill itself, against the drawer, promisor, or acceptor, must fail of a recovery in that action. But he is not without remedy; for, if a fair and *bona fide* purchaser without notice, he may recover of the indorser on his indorsement. *Bowyer v. Bampton*, 2 Stra. 1155.

In the case of *Lowe and others v. Waller*, Doug. 736, in which all the former cases are well considered, Lord *Mansfield* himself says: "It is better that the law should be as it is with respect to bills and notes, than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he cannot recover on the bill."

I am therefore of opinion that the witnesses offered are admissible, notwithstanding they have put their signature upon the bill.

SWIFT, J. The question whether a party to a negotiable instrument, who is divested of his interest, is a competent witness to

show it void in its creation, now comes for the first time before this Court for decision. We are unshackled by any precedent, and are at liberty to decide it on principle.

In the case of *Walton v. Shelley*, the rule was laid down, that no party who had signed an instrument should ever be permitted to give testimony to invalidate it. Though the Court and counsel speak of it as a well-known rule, yet it can be found in no prior case.

Lord *Mansfield*, who had borrowed many valuable principles from the civil law and incorporated them with the common law, attempts to support his decision by what he says is a maxim of the civil law, *nemo allegans suam turpitudinem est audiendus*; but there is no such rule to be found in the civil law as applicable to witnesses, and it is the daily practice in common-law courts to admit witnesses to testify to facts which show they have been parties to trespasses, frauds, and crimes.

The rule, as laid down in the case of *Walton v. Shelley*, comprehends instruments not negotiable as well as those which are, and does not require the action to be brought on the instrument; but if the consideration be antecedent notes given up, yet if the witness indorsed such notes, he is incompetent. If this principle should be carried to its full extent, it would furnish an effectual shield for usury, gambling, fraud, and illegal contracts. Let all who are concerned in the transaction, or who have knowledge of it, become parties to the writings made use of, and there will be neither danger nor possibility of detection. So manifest was the mischief of this rule on so broad a basis, that the Court of King's Bench, in the case of *Bent v. Baker*, in order to avoid it, were obliged to restrict it to negotiable securities, and in the case of *Jordaine v. Lashbrooke*, wholly to explode it. So that the case of *Walton v. Shelley* has been overruled, and is not now law in that country.

But as this rule, as far as it relates to negotiable instruments, has been adopted by highly respectable judicial tribunals in our sister States, it may be proper to examine it.

In the case of *Walton v. Shelley*, Lord *Mansfield* says that whenever a man signs these instruments he is always understood to say that to his knowledge there is no legal objection. In the case of *Coleman v. Wise* and others in the State of New York, the same principle is recognized. But there is not a precedent or

dictum to warrant this position. When a man subscribes or indorses an instrument, he contracts certain legal liabilities, and he sets his name to it for no other purpose. He enters into no engagement that he will never testify that the instrument was obtained by fraud or duress; or was given for a gambling or usurious consideration; or that he will never make such plea. Every party to an instrument has a right by his plea to show it was originally void. How then can it be pretended, that by signing it he is understood to say that to his knowledge there is no legal objection to it? If he contracts such obligation, the true principle would be not to permit him to make a plea or defence repugnant to it. To allow him to plead a fact which shows the instrument void in its creation, and then to refuse him the privilege of proving it, at least by one species of testimony, is a palpable absurdity. The iniquity really consists in the defence itself, and not in the mode of proof; for certainly it would be as unjust for the defendant to make out his defence by a witness not a party to the instrument as by one that is a party.

In the case of *Churchill v. Suter*, 4 Mass. 156, Chief Justice *Parsons* says: "If the parties to the usury or the gambling, having received the fruits of their illegal contract, and having given a circulation to the note, can be admitted by their testimony to destroy it, besides the injury to the fair purchaser, the negotiation of paper will be greatly checked, to the no small injury of the public." This supposes that the indorser combines with the maker of the note to have it transferred to an innocent indorsee, and then by his testimony to avoid it for usury. All will acknowledge such conduct to be highly criminal. But suppose there was originally no intent to defraud an innocent indorsee, and while the note is held by an indorsee having knowledge of the usury, for a usurious consideration, the indorser, by an act of bankruptcy, becomes discharged of his interest, it will be agreed then to be perfectly right for him to testify to the usury to avoid the note. Again, suppose a usurer has taken a most unreasonable advantage of the distress and misfortunes of another, and has compelled him to obtain security by the indorsement of a friend whom he cannot indemnify; he then puts the note in suit, and there is an indorser who has become disinterested who is knowing to the oppression and usury; it would clearly be his duty to come forward and testify to the usury for the purpose of destroying the note. Yet by the

rule contended for, the indorser in both these cases would not be permitted to testify.

Here then, for the purpose of protecting the possible case of the innocent indorsee, ample protection is furnished to the certain case of the usurer and oppressor.

Again, it is said, "that persons may be witnesses against their accomplices, because their testimony tends to prevent fraud and injustice, but in this case it tends to encourage it, by enabling parties to enjoy the fruits of it, and throw the consequence on an innocent indorsee." When accomplices are admitted to testify, the inquiry is not made whether it will or will not tend to encourage fraud: for if it should, it was never heard that this would be an objection to their testimony. The object is to punish crimes; and as in many cases this cannot be done without the testimony of accomplices, the law admits them.

But to illustrate the subject: suppose a combination to defraud an innocent indorsee by a usurious note; the real usurer, to accomplish this plan, does not set his name to the note, and is rendered by releases disinterested; he would then be a competent witness to prove the usury; yet his testimony would tend to encourage fraud and injustice as much as if his name had been set to the note. This clearly shows that no such rule as that above mentioned exists.

It is further said, "No man shall be admitted to allege his own turpitude, when that allegation will tend to encourage fraud, or illegality. Nor shall the defendant in his defence allege his own wrong." This is no more than laying down the well-known maxim that no man shall take advantage of his own wrong; but this has always been applied to the parties, and is now for the first time attempted to be applied to witnesses. Though this rule be generally true, yet a statute can control its operation. Suppose a fraudulent combination to cheat an innocent indorsee by a usurious note, and a party to the fraud and the note is sued thereon; he may plead the usury to avoid it. Suppose the plaintiff replies the fraudulent combination, and that an indorsee is the only person who has knowledge of the fact. Unquestionably, the replication would be bad, and the note void. Here, then the party is permitted to take advantage of all the turpitude, fraud, and wrong which the above rule intended to exclude. Suppose an issue should be joined on the fraudulent combination; a party to the

fraud, if not a party to the note, might, on the principles contended for on the other side be admitted as a witness: he would then testify to his own fraud and turpitude. The truth is, the real question in all these cases is, whether the note was given for usury; and this the party by force of statute may always plead, however base and shameful the transaction may be; and may prove it by competent witnesses, however deeply they may have been concerned in it. It is in vain to talk about the turpitude of witnesses and the wrong of the defendant. *Ita lex scripta est.*

But public policy is the strong argument against the admission of parties to an instrument to invalidate it by their testimony. It is said, the makers and indorsers of negotiable notes may combine to defraud innocent indorsee, which would check and embarrass their negotiation, and prevent their circulation. It is true, such fraudulent combinations can be made, and the indorser of the note may testify to the usury on a suit against the maker, and the note may be avoided in the hands of an innocent holder. It is also true, that a similar fraud may be practised without the aid of an indorser or party to the note for a witness. Suppose two men wicked enough to contrive such a plan: they may make use of some friend expressly for the purpose of being a witness to the usury; they may indorse the note to some person ignorant of it, and divide the spoils; and on a suit by the indorsee, such friend may be called as a witness, and prove the usury. Here is precisely the same inconvenience and fraud as in the other case, and the same injury to the circulation of negotiable notes, yet it cannot be denied that in this case the note must be set aside; for there is no legal objection to the witness, he has no interest, his name is not on the paper. When men are unprincipled enough to practise frauds of this description, I think it is much more probable that it will be done by the intervention of some friend whose name is not on the note than by an indorser. Of course, this rule would furnish very inadequate relief if such a fraudulent scheme should seriously be adopted.

But if principles of public policy are to govern, they ought to extend to all cases where the injury is the same; and the rule ought to be, that no defendant should ever be admitted to plead usury, or any other fact, to avoid a negotiable instrument in the hands of an innocent holder. This would do complete and equal justice in all cases. But how unequal is this rule. It will pro-

fect the innocent holder in one case, but not in another under the same circumstances, and within the same reason ; and where it protects the innocent holder, it furnishes the same protection to the usurer ; for the rule in *Walton v. Shelley* makes no difference whether the holder knew of the usury or not : and in the case decided in Massachusetts the plaintiff on the record was the actual usurer. A rule cannot be right which protects the very usurer the law intended to punish in one case, and in another subjects the innocent holder to a loss which it was the object of this rule to prevent.

But to decide on the policy of this law it is necessary to consider the object of the legislature in making it. It is manifest they intended in the most effectual manner to suppress usury. If they had admitted the principle, that usurious notes should be valid in the hands of innocent holders, they would have furnished a mode by which usury could have been practised with safety, and the law rendered nugatory. To shut the door against all such artifices, the law enacts that usurious securities shall be absolutely void. It must have been well understood that instances would occur where innocent indorsees might be prejudiced, and that parties to instruments, when not otherwise disqualified, might, by the general rules of evidence, be admitted to invalidate, by their testimony. It is not probable that the legislature contemplated precisely such a fraud as it is suggested may be practised : it must however have been known that notes might be set aside in the hands of innocent holders, which would operate hardly, if not unjustly, in particular cases ; but as a special provision in such cases would have defeated the statute, it must be understood that they intended to declare the notes void in the hands of innocent holders, considering the great object of suppressing usury of more importance than to promote the negotiation and circulation of notes by protecting innocent holders in the few cases where they might be affected. If there is any thing wrong in this business, any thing opposed to public policy, it is in the statute which makes void usurious notes in the hands of innocent holders ; but this is a wrong which no court of law can remedy. It would be strange indeed for them to say, that a statute is not founded on principles of public policy, and then, though they cannot declare it void, yet they will refuse legal evidence to carry it into effect. This is an attempt by indirect means to repeal a statute. The legislature have decided on the policy of the measure ; and it is the duty of courts to give it due operation.

But it has been said by Justice *Buller*: "It would be attended with consequences the most injurious to society if these securities might be cut down by the persons passing them; it is only for two men to conspire together to cheat all the world." *Peake's Cases*, 118. Chief Justice *Parsons* says: "For any man by contriving with another may take up money of him at usurious interest, and give him a negotiable note for security. The promisee may sell it for a valuable consideration, and when the indorsee attempts to recover the money, the promisor and indorser may (at least by releases) be witnesses for each other, and defeat the purchaser of his remedy, and quietly enjoy the money he has paid for the note." 4 Mass. 162.

It might be inferred from these observations, that innumerable frauds would be practised, if a party to a negotiable instrument could be a witness to impeach it, and that all confidence in negotiable paper would be destroyed: yet the truth is, no innocent holder of a note could ever sustain a loss, unless by the bankruptcy of his indorser, or the person from whom he received it; and he has nothing to do, to guard against a fraud, but to require the same ability in his indorser as prudent men ordinarily require when they give credit. It would also seem, from the remarks above quoted, that an opinion was entertained that the parties to a usurious note could transfer it without liability to the vendee. Chief Justice *Parsons* says, that they may defeat the party of his remedy, and quietly enjoy the money. It is true, in a suit by the indorsee against the maker of the note, the indorser might be a witness, as he would testify against his interest; but in a suit by the innocent indorsee against the indorser, the testimony of the promisor would be of no avail, unless the indorsement was void on account of the usury contained in the note; and that the indorsement was void must have been the opinion of Chief Justice *Parsons*. otherwise he could not have said that the promisor might be a witness for the indorser, and thereby defeat the remedy of the purchaser. But it is an unquestionable principle, that though the note is void on account of the usury so that no action can be sustained upon it, yet if the promisee indorse it to a *bona fide* purchaser ignorant of the usury, he is liable on his indorsement; for this is a new contract not contaminated with usury, and it is binding on him, though the original note is void. If it should pass into the hands of an innocent purchaser without indorsement, if

the seller conceal the usury, an action would lie for the fraud. The consequence then is, that men of property can never combine to practise a fraud of this description: for one or the other would always be responsible in some shape on the sale; and though they might defeat the purchaser of one remedy, they would be liable in some other mode; and consequently could not enjoy very peaceably the fruits of their fraud, or very successfully cheat all the world. The apprehension, then, of danger from a fraudulent combination of the parties to a negotiable instrument, is founded on a mistaken view of the operation of the law respecting their liabilities.

But what are the frauds that can be practised in such cases? The only successful mode must be by the instrumentality of indorsers, without ability to respond. Let us examine what frauds can be practised by the combination of a poor and a rich man. The poor man must always be the indorser. A man of property would never give his note to a bankrupt without consideration, on the risk that he will sell it, divide with him the spoils, and swear him clear of the debt. A poor man would hardly loan money or other property to a rich man on a usurious security, for the privilege of selling it, under an obligation to discharge the usurer by his testimony, and with a liability of going to jail himself for another man's debt. A man of property would have little inducement, unless he received the full sum, to execute a note and run the risk that the promisee should swear him clear of it. The promisee could not be compelled to testify, as it would be against his interest; and he might die before the trial. A man of property runs a further risk; if he should practise such a fraud and avoid the note, yet he would be liable to an action in favor of the innocent indorsee whom he had cheated; and it would always be in the power of his coadjutor in the fraud to betray and subject him. So remote is the prospect of deriving any advantage from a fraud of this description, that I very much question whether an attempt ever has been, or ever will be, made to practise it. The calling on an indorser or other party to testify will always be an after calculation, and will probably occur only where there has been some failure or embarrassment.

What can be the injury to the circulation of negotiable paper to admit the parties to invalidate it by their testimony? It might prevent prudent men from taking the indorsements of bankrupts.

This would not be very injurious to the commercial world. In the case of failure of the parties to the instrument after the indorsement, it might in some cases throw the loss upon a different party, but this would in reality, be little more than the common risk of loss by failures, which every man runs in a commercial country where extensive credit is given.

I apprehend, then, there is no solidity in the argument drawn from considerations of public policy.

But let us consider what will be the effect not to admit a party to negotiable paper to invalidate it by his testimony. It will certainly furnish very ample protection to usurers. Conceal the usury from all who are not parties, and there can be no proof in an action founded on the obligation. The only method, then, must be a public or *qui tam* prosecution. The parties affected by the usury will usually be the witnesses, and can get no redress. They can rarely calculate on such advantages from *qui tam* prosecutions as to realize any thing more than a gratification of revenge; and if a usurer has nothing more to restrain him than such prosecutions, the statute against usury will be of little consequence.

In practice it will be found that this rule has much oftener protected the usurer than innocent indorsees. In the case of *Walton v. Shelley, Sutton*, by whose assignees the action was brought, must have known the usury. The bond was executed in consideration of notes given up. If he had been ignorant of the usury, the bond would have been good. In the case of *Churchill v. Suter*, the usurer was the plaintiff. In both cases, the usurers were protected.

In the case before us, the rule in *Walton v. Shelley* would have screened the party charged with the usury, and would have subjected the defendants to pay; but the rule I contend for would have visited the consequences of the usury upon the usurer. In the suit by *Derby Bank* against the plaintiffs in New York, if *E. and A. Townsend* had not been excluded from testifying on the ground that they were parties to the bill, then the plaintiffs (admitting the usury existed as conceded by the pleadings) would have made good their defence, and the *Derby Bank* would have had a complete remedy against their indorser, who is stated to be the usurer. But the application of that rule has effectually protected him.

In this case, there would have been no difficulty, had it not been for the failure of E. and A. Townsend. As the plaintiffs indorsed and the defendants accepted as sureties for them, though their indorsements and acceptance were void as they were made to secure the usury to Leffingwell; yet if they had been subjected to pay, they could clearly have recovered of E. and A. Townsend for money paid by them as sureties; for in the implied promise to indemnify there was no usury, as they were unacquainted with the nature of the transaction between Leffingwell and them. But now, by their failure, they have lost their remedy; the application of different rules by the courts in the State of New York and Connecticut has subjected the plaintiffs to suffer a loss by the bankruptcy of E. and A. Townsend, which the defendant must have sustained, if the bill had not been usurious. This loss, however, is owing to the bankruptcy of E. and A. Townsend, and not to any preconcerted plan to cheat them.

As to the question respecting the usury; it appears from the facts stated, that on a contract between Leffingwell and E. and A. Townsend, they were to draw a bill on Bush, in favor of E. and A. Townsend, to be accepted and indorsed; and on this security the money was to be loaned at twelve per cent. Here the drawing, accepting, and indorsing were to secure the usury to Leffingwell; and though the acceptors and indorsers were ignorant of the usury, yet this does not prevent the transaction from being usurious; for it was manifestly a contrivance to evade the statute, and if allowed of, usury might be practised with impunity.

The other judges concurred.

New trial to be granted.

See preceding and following cases.

ROYAL THAYER v. WILLIAM CROSSMAN.

(1 Metcalf, 416. Supreme Court of Massachusetts, September, 1840.)

When indorser competent to prove payment. — In an action by the indorsee against the maker of a note indorsed overdue, the indorser is competent to show payment before the note was indorsed.

THE case is stated in the opinion of the Court.

SHAW, C. J. This case comes before the Court by exceptions from the Court of Common Pleas. The action is on a promissory note, by an indorsee against the promisor, the note being dated November, 1832, payable on demand to the promisee or his order, and indorsed to the plaintiff. The defendant offered the indorser as a witness, to prove payment of the note before the indorsement; but the presiding judge at the trial rejected this testimony. The ground of this rejection was, as we understand by the argument, the rule laid down in *Churchill v. Suter*, 4 Mass. 156, that an indorser shall not be permitted by his testimony to invalidate a security, which he has put in circulation, and given credit to by his indorsement.

We do not think it necessary now to consider at large the authority of the rule in question, as a rule of law in this State. It was first formally laid down, in the time of Lord *Mansfield*, in the case of *Walton v. Shelley*, 1 T. R. 296. It was afterwards overruled in the same Court, the Court of King's Bench, in the time of Lord *Kenyon*, by three judges against one; Mr. Justice *Ashurst*, who had concurred in the former opinion, dissenting. *Jordaine v. Lashbrooke*, 7 T. R. 601. Both these cases were before the Court when the rule was sanctioned in this Commonwealth. *Warren v. Merry*, 3 Mass. 27; *Churchill v. Suter*, 4 Mass. 156. It continued to be acted on as a settled rule here, and was again considered and confirmed in the case of *Packard v. Richardson*, 17 Mass. 122. It was adopted in 1802, by a majority of three to two, in the Supreme Court of New York; *Radcliff* and *Kent, JJ.*, dissenting. *Winton v. Saidler*, 3 Johns. Cas. 185. But it was afterwards overruled, and has ceased to be regarded as a rule of law in that State. *Stafford v. Rice*, 5 Cow. 23; *Williams v. Wal-*

bridge, 3 Wend. 415. In Connecticut, the rule has been rejected by a formal decision in 1818. *Townsend v. Bush*, 1 Conn. 260.¹

But supposing the rule settled for this Commonwealth, by a course of decisions too direct and uniform to be now drawn in question, still it becomes necessary to examine the rule itself, to ascertain its extent, limits, and qualifications, in order to determine whether the present case is within it. The general rule is, that any person, not infamous, or interested in the event of the cause, may be a witness; and it is manifest that the rule in question, which excludes a witness on the grounds of public policy, is an exception to the general rule; and an exception ought not to be extended beyond the limits to which those reasons of policy fairly carry it.

In *Walton v. Shelley*, the rule laid down, as the rule founded on public policy, was, that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate the instrument. Very shortly after, in the case of *Bent v. Baker*, 3 T. R. 27, some of the judges in alluding to *Walton v. Shelley*, take care to confine the rule to the case of negotiable instruments, upon the ground that a man shall not by putting in circulation a negotiable instrument, which any man may take and make himself a holder of, and which passes solely upon the credit of the names of the parties appearing upon it, hold out false colors to the public. And almost the entire argument of Mr. Justice *Ashurst*, in *Jordaine v. Lashbrooke*, in support of the rule of *Walton v. Shelley*, was founded upon the policy of giving security to negotiable instruments, put into circulation in the course of business.

In *Warren v. Merry*, 3 Mass. 27, the rule and the reasoning are confined to the case of negotiable securities, and this rule is expressly so limited by a decision in *Loker v. Haynes*, 11 Mass. 498. In *Churchill v. Suter*, 4 Mass. 156, after considering the authorities, and considering them as leaving the point unsettled, the Court proceed to consider the case on principle. They confine the rule to the case of negotiable securities; and the whole course of the reasoning further limits this rule to securities negotiated in the course of business, and which are not dishonored. The Court recognize the general rule, that in order to give security to the circulation of negotiable paper, in an action between indorser and promisor, the consideration cannot be inquired into. An exception

¹ *Ante*, 507.

to this rule arises from the statutes of usury and gaming, which declare securities, given on a gaming or usurious consideration, absolutely void ; and such defence therefore may be taken advantage of by a promisor, in a suit by an indorsee. And therefore the rule of policy is mainly confined to the case of a defence on the ground of a gaming or usurious consideration, which by force of the statutes in question affects these securities with a secret taint, which cannot be known to an indorsee.

In the case of *Fox v. Whitney*, 16 Mass. 118, the rule is still further limited and explained, by the considerations of public policy on which it was founded. The general rule is recognized, but it is held to apply only to a case where a man indorses a negotiable security, and by that act gives a currency and credit to it; and it was held that it did not apply to a case between original parties, each of whom was conusant of all the facts. The suit, in that case, being by the representative of the promisee against the representative of the promisor ; a party to the note, as co-promisor, was held to be a competent witness, to prove the note given on a usurious consideration, and, as the law then stood, void.

In the case of *Barker v. Prentiss*, 6 Mass. 430, Taber, one of the indorsers, was admitted to prove that the indorsement was intended to be limited, and that the indorsee knew it. The reasoning of the Court obviously confines the rule in *Churchill v. Suter*, so as to prohibit a party to a usurious or gaming negotiable security, which is void in the hands of an innocent purchaser, from impeaching it in the hands of such purchaser. And they held that a party to such security may be a witness to prove subsequent facts, which admit the legality of the instrument in its original form. The authority of this case, on other points, has been often called in question ; but I am aware of no case, in which the point now stated, has been doubted.

Taking this case as thus stated, it would seem that a party is restrained from testifying only as to facts which render the security void in its creation, and that consistently with the rule, an indorser, if not interested, might be called to prove payment before he indorsed the note, being a fact subsequent to its creation and not rendering it originally void. This is opposed, apparently, to what is implied at least, if not decided, in *Warren v. Merry*, 3 Mass. 27. That was an action by an indorsee against the indorser, and the maker was held admissible to prove that he paid the plaintiff after the indorsement, and before the note was payable. But

the remarks of the Court seem to imply that a payee would not be admitted to prove payment to himself before his indorsement. It may, however, be remarked, that if a note is paid before it is due, and is afterwards indorsed, before it is due, to one who has no notice of the payment, such payment is no defence to a suit by the indorsee against the promisor.

A similar principle seems to have been adopted in *Parker v. Hanson*, 7 Mass. 470, where an indorser was called to prove that a note had been fraudulently altered in the date. The Court say he is not within the rule; the note not being objected to as originally void, but as having been fraudulently altered.

Perhaps the case of *Knights v. Putnam*, 3 Pick. 184, may be considered as countenancing the rule, that a note indorsed in the ordinary course of business cannot be impeached by the testimony of the indorser, for any cause existing at the time of the indorsement. This question will therefore deserve consideration, when it shall expressly arise for adjudication.

In a review of the cases, that of *Butler v. Damon*, 15 Mass. 223, deserves consideration. It implies that the principle of *Churchill v. Suter* would so apply, as to exclude a party who had indorsed a note after it was due, as well as one who had indorsed it before it was due, from showing facts antecedent to the transfer, to defeat a holder of his recovery. The opinion does not state this; but it may be implied from the fact, which appears by a comparison of the dates, that in that case the note was overdue, when indorsed. But it is manifest from the very brief report of that case, that the attention of the Court was not drawn to that distinction; nor does the remark of the judge, who gave the opinion, refer to it. But what is a more material observation upon that case as an authority is this; that the indorser had not been offered as a witness, but the defendant had been allowed to give in evidence, not the testimony, but the declarations of the indorser, made, after the indorsement, to the plaintiff. This was obviously inadmissible. It could not be received as an admission, because made after his interest had ceased, and he could not confess away a title he had given by his indorsement; nor as proof of any fact, because it was hearsay. The point, whether the indorser could have been received as a witness, having indorsed the note after it was due and dishonored, was not before the Court, and the cause was decided on other grounds. As an authority, therefore, that case has but a slight bearing upon the present.

From this view of the authorities, and assuming that the rule, as laid down in *Churchill v. Suter*, is the true rule of law in this Commonwealth, we think it will appear to be confined to negotiable bills and notes, actually indorsed and put into circulation by the witness, with a view to give them currency as negotiable securities. The object, which the law has in view, is to give a secure currency and circulation to negotiable securities, taken in the ordinary course of business by an innocent indorsee, without notice of its dishonor. But it is no object of the law, or of public policy, to give currency to dishonored bills; and a note overdue carries notice of its own dishonor on its face. An indorsee of such a note is presumed by law to have notice of every defect which may exist, either in the original creation of the note or subsequently; he takes it, therefore, not upon the credit of the names it bears, but solely upon the faith he may have in the indorser. He takes, in legal contemplation, a legal title, indeed, that is, a right to sue in his own name; but he takes a right to recover only as the indorser himself could recover, and of course he takes with full constructive notice of all grounds, legal and equitable, which the defendant might have, if the suit were brought by the promisee, and subject to all the same species of defence. As between the original parties, and to a note not negotiated and put in circulation, we have seen the rule does not apply. *Fox v. Whitney*, 16 Mass. 118. By the rules of law, an indorsee, taking a note overdue, takes it subject to every defence; and that case, therefore, is an authority for the admission of an indorser, when the plaintiff can claim only the same rights as if the suit were between the original parties. The authorities are so numerous and explicit, that the indorsee of a dishonored note takes it subject to all defences, that it is unnecessary to cite them. *Sargent v. Southgate*, 5 Pick. 312.

In applying these rules to the present case, the Court are of opinion that the case was not within the principle of *Churchill v. Suter*, because the note was overdue and dishonored, when it was indorsed to the plaintiff.

In the first place, it appears that this was a note payable on demand, and the evidence is, that it was indorsed nearly two years after its date. What is the shortest time, within which a note on demand will be deemed a dishonored note, has not been explicitly settled. But we have no hesitation in considering such a note as overdue and dishonored in a much shorter time than two years.

In *Spring v. Lovett*, 11 Pick. 417, it was considered that an indorser would be a competent witness to prove that the note was indorsed after it was due. But there is no necessity of relying on this point, in the present case, because it appears by other evidence, independent of the testimony of the indorser. Before coming to the question, therefore, whether the indorser in this case was a competent witness, it is proved by unobjectionable evidence, that the plaintiff took the note by indorsement, as a dishonored note. In Pennsylvania, where, it is believed, the rule of *Walton v. Shelley* is still in force as a rule of evidence, it is held that it only applies to a negotiable security, indorsed and put into circulation in the usual course of business, and that it does not apply to a note overdue or otherwise dishonored. *Baird v. Cochran*, 4 Serg. & Rawle, 397. This appears to us to be a just limitation and modification of the rule relied upon, and supported as well by authorities, as upon the reasons and principles of public policy, on which the rule itself is founded. The Court are therefore of opinion, that Waters, the indorser, ought to have been admitted as a witness, to prove payment of the note before its indorsement; and because he was not so admitted, the exceptions must be sustained, and a new trial had.

New trial to be had at the bar of the Court of Common Pleas.

No branch of the law is in greater confusion in this country than that discussed in the three preceding cases. It is now too late to hope for any uniform doctrine upon the subject in the American courts. We have presented three well-considered cases, the first adopting, the second rejecting, and the third substantially rejecting, the doctrine of *Walton v. Shelley*, each recognized and followed in different States of the Union, and each supported by highly respectable authority.

We cannot expect to add any thing to the learning that has been displayed upon the subject; and will merely state that in our opinion the doctrine of *Townsend v. Bush* and of *Thayer v. Crossman* presents the most just and sound view of the law. In cases of usury, and between immediate parties, or, what is the same thing, as against an indorsee who is not a *bona fide* holder, in due course of trade, the signer may invalidate the paper, according to those cases; but this is the extent of the rule; and this is virtually the present doctrine of the English courts, and has been ever since *Walton v. Shelley* was overruled. See *Chitty, Bills*, 669. Our reasons for maintaining this view are substantially those advanced in the above-named cases of *Townsend v. Bush* and *Thayer v. Crossman*, and need not be repeated.

The rule of exclusion has been adopted in the following States. In Maine, *Clapp v. Hanson*, 15 Me. (3 Shepl.) 345; in Iowa, *Strang v. Wilson*, 1 Morris, 84; in Ohio, *Treon v. Brown*, 14 Ohio, 482; in Mississippi, *Drake v. Henly*, Walker, 541.

The rule has been rejected in New York, *Stafford v. Rice*, 5 Cow. 23; in Kentucky, *Gorham v. Carroll*, 3 Litt. 221; in Alabama, *Todd v. Stafford*, 1 Stewart. 199; in Maryland, *Ringgold v. Tyson*, 3 Harris & J. 172; in New Jersey, *Freeman v. Brittin*, 2 Harr. 192; in Virginia, *Taylor v. Beck*, 3 Rand. 316; in Tennessee, *Stump v. Napier*, 2 Yerg. 35; in New Hampshire, *Haines v. Dennett*, 11 N. Hamp. 180; in Vermont, *Nichols v. Holgate*, 2 Aiken, 138; but see *Chandler v. Mason*, 2 Vt. 193; in Missouri, *Bank of Missouri v. Hull*, 7 Mo. 273.

But one who signs in the usual manner of an indorser cannot show that it was the intention of the parties that he should merely guarantee the signature of the payee to be genuine. This would be to vary the terms of a written contract by parol. *Prescott Bank v. Caverly*, 7 Gray, 217. See *Riley v. Gerrish*, 9 Cush. 104; *Hall v. Newcomb*, *ante*, p. 131; *Bank of the United States v. Dunn*, *ante*, p. 503.

THE COMMERCIAL BANK OF ALBANY v. GEORGE W. STRONG.

(28 Vermont, 316. Supreme Court, February, 1856.)

Sufficiency of proof. — A decision of the county Court, as to the sufficiency of certain proof, *held*, to refer to its character, or quality and competency, and not merely to its quantity or force, in convincing the mind.

Where notice should be sent. — A notice of the dishonor of a bill of exchange, or promissory note, should be addressed to an indorser at the place of his residence, unless he is shown to have a place of private business elsewhere. The office of a corporation, of which he is an officer (in this case the president), in a town different from that in which he resides, will not, in the absence of proof be regarded as his private business place; and a notice addressed to him there will not be sufficient.

Number of Witnesses. — That a notice to an indorser was seasonably deposited in the post-office need not be proved by a single witness. If more persons than one participated in the act, the testimony of all of them should be adduced.

Consideration of the probability as to the manner in which the notice in the present case was directed and sent to the defendant; and of the testimony, in reference to its legal sufficiency, to prove that the notice addressed to the defendant as indorser, was put into the post-office, seasonably to charge him.

ASSUMPSIT against the defendant as an indorser of a bill of exchange, drawn by the Rutland & Washington Railroad Company, by George W. Strong, president, upon, and accepted by the treasurer of that company, dated at the office of the Rut. & W. R. Co., West Poughkeepsie, and made payable to the order of Eastman and Page, at the American Exchange Bank, New York, indorsed by Eastman and Page, John Bradley, George W. Strong, J. W. Baldwin, and M. Clark. Plea, the general issue; trial by the Court, September term, 1855, — PIERPOINT, J., presiding.

The drawing, acceptance, indorsements, presentment, non-payment, and protest of the bill were duly proved. The testimony tending to prove notice to the defendant of the non-payment and protest was as follows: —

The notary, by whom the bill was protested, deposed that he enclosed to the cashier of the plaintiffs a notice, in due form, to the defendant as indorser. Attached to his deposition were three notices, produced and exhibited to him by the defendant, which the notary testified were filled up in his handwriting, but he could not testify further as to their identity. One of these notices was addressed, on the inside, to "George W. Strong," and purported to be a notice to him as indorser, and was directed on the outside to "George W. Strong, Esq., West Poultney, Vt.;" another was addressed, on the inside, to "George W. Strong, Pres't, Rut. & Wash. R. Co.," and purported to be a notice to him as drawer, and had the word "Rutland" on the lower right-hand corner, in writing different from that of the notary; and the other was addressed on the inside to "Geo. W. Strong, Esq., Pres't, &c., and to Geo. W. Strong," and purported to be a notice to him, both as drawer and indorser, and was postmarked with the New York city post-office stamp, and was directed on the outside to "Geo. W. Strong, Esq., Pres't, and Geo. W. Strong, West Poultney, Vt."

William D. Case testified that during the month of June, 1854, he was a clerk in the Commercial Bank of Albany; that it was his special duty to make a record, in a book kept for that purpose, of the notices of protests of the non-payment, &c., of notes, bills of exchange, &c., received at the bank, and to send said notices to the different persons, whose paper had been protested; that in the forenoon of the twentieth of June, 1854, said bank received by mail, from the city of New York, a notice of the protest for non-payment of the bill of exchange or draft in question, and that enclosed with said notice were four notices in all respects like it, addressed to George W. Strong, Merritt Clark, James W. Baldwin, and John Bradley; that on the twentieth of June, 1854, in the forenoon, and immediately after the receipt by said bank, of said notice of said protest, he enclosed one of said four notices of protest, which was addressed to George W. Strong, in an envelope, which was addressed by him to "George W. Strong, Rutland, Vermont," whose place of residence was communicated to him by the cashier of said bank, on his inquiry for the residence of said Strong,

at the time of addressing said letter ; that after enclosing said notice in the envelope addressed to said Strong, he laid it on his desk, to be taken and deposited in the post-office in Albany, and afterwards, on that day, the letter was gone from his desk ; that it was the daily and special duty of Edwin W. Belden, the youngest clerk, to take all letters from the bank to the post-office, and in his absence it was the duty of James P. White, the next oldest clerk, and in the absence of both, he, said Case, took the letters ; that it was his daily and uniform practice to place all his letters, including those enclosing notices of protest, on his desk ; that each clerk had his separate desk, and no person, excepting the officers of said bank, could have access to them ; that he did not know the residence of said Strong, at the time of enclosing said notice to him, but was informed and directed by the cashier so to direct, and he did so direct it ; that the word " Rutland," at the lower right-hand corner of the notice, addressed to George W. Strong, Pres't of the Rut. & Wash. R. Co., attached to the deposition of the notary, was made by, and in his (the said Case's) handwriting.

Edwin W. Belden deposed that on, prior, and subsequent to the twentieth of June, 1854, he was a clerk in the Commercial Bank of Albany, and that if he took a letter from the desk of William D. Case, on the said twentieth of June, 1854, or at any other time, for the purpose of depositing the same in the post-office, at Albany, he did so deposit the same, on the same day on which it was taken for deposit in said office ; that it was his duty to take the letters from the said bank to the post-office, and he usually did so during the month of June, 1854 ; that he generally took the letters from the bank to the post-office, and had frequently taken letters from the desk of Case, and deposited them in the post-office at Albany ; and on his cross-examination he deposed that he had no recollection of ever taking, or putting into the post-office, a letter addressed to the defendant.

James P. White deposed to substantially the same, in effect, with Belden, that if he took such a letter from the desk of Case, to deposit in the post-office, he did so deposit it on the same day, &c.

The foregoing was all the testimony upon this point, except that it appeared that the residence of the defendant was in Rutland, and that the office of the Rutland & Washington Railroad Company was in West Poultney.

The Court found the facts proved as stated in the foregoing

testimony of the witnesses, but upon that evidence they decided that there was not sufficient proof of notice to the defendant, to charge him as indorser, and rendered judgment in favor of the defendant.

Exceptions by the plaintiffs.

REDFIELD, C. J. This is an action upon a bill or draft against the defendant, as indorser. The only question made in the case is in regard to the proof of notice of dishonor to the defendant. The case being tried in the Court below, without the intervention of the jury, some question has been made upon the bill of exceptions, whether any question of the sufficiency of the evidence of notice is properly before this Court. But as the testimony is detailed very much at length, and the Court say they "found the facts proved, as stated in the testimony of the witnesses," and also that, upon the foregoing evidence, which is certified to be all the evidence given upon this point, they decided that "there was not sufficient proof of notice to the defendant, to charge him as indorser," we can only conclude that they did refer to the character and competency of the proof, and not to the quantity; to the quality, rather than the amount and force of the evidence in convincing the mind.

We must, then, see what was the character of the evidence given.

I. We do not think there is any doubt as to the particular notices sent, either from New York, where the bill was made payable, and where it was protested, or from Albany, where the bill seems first to have been negotiated. It is obvious that the notice, having the New York city post-mark upon it, and which is addressed to the defendant in the double capacity of president of the Rutland & Washington Railroad, on whose behalf he drew the bill, and also as indorser, in his private and personal capacity, was sent by the notary, protesting the bill, direct from New York to West Poughkeepsie, where the railroad office seems to have been kept. But as the defendant, at the time, had his residence in Rutland, we do not regard a notice addressed to him at West Poughkeepsie sufficient to charge him as indorser, there being nothing to show that he had any private business place at West Poughkeepsie. No case of that character has been shown to us, and the general course of decision is certainly, that notice to an indorser must be sent to the place

of his residence, unless he is shown to have his place of business elsewhere. There may be cases where one has different places of business, that notice addressed to either is sufficient. But although the defendant is not shown here to have any particular place of business in Rutland, distinct from his dwelling, yet, as he had no place of private business out of Rutland, his dwelling was his place of business, to which notice should be addressed to charge him as indorser.¹

II. We think it is obvious that the notary, having sent this double notice direct from New York, would not have probably sent another addressed to the defendant at the same place, as indorser only. The strong probability is, that he sent two distinct notices to Albany for the defendant, one as drawer, on behalf of the railroad, and the other as indorser only. These being put into each other, and the outside one addressed, upon the back, West Poultney, Case, the teller, doubtless took them to the cashier, in the manner he testifies, and learning the residence of the defendant, marked it upon the inside one, which happens to be the one addressed to the defendant as president, &c. But most undoubtedly both were sent to Rutland by Case in the manner testified, as there is no other reasonable mode of accounting for their being in the possession of the defendant, or, indeed, of their being made by the notary, in addition to the double one already sent. The teller, indeed, calls it one notice, and it was so, in some sense, being to one person, but in two quite different capacities. The teller might not have recollected precisely the facts, but it must have been so, to account for his own memorandum upon one of these notices, and also his entry of the notice sent to the defendant, as indorser, upon the notice sent to the Commercial Bank, and produced upon the trial, with the memorandum of the notice sent to Strong, as indorser.

III. The question is reduced then to the narrow point, whether there was sufficient evidence that the notice to the defendant, as indorser, which Case testifies he enclosed in an envelope, and addressed to the defendant at Rutland, and which the county Court finds to be true, and which there is no reason to question, and which he also says he laid upon his desk, and which was afterwards, on the same day, gone from the desk, was really shown to have been deposited in the post-office at Albany, in season for the mail

¹ See *Munn v. Baldwin*, *ante*, 376, and note; *Bowling v. Harrison*, *ante*, 378, and note; *Bank of Columbia v. Lawrence*, *ante*, 404, and note.

of the next day. As it was gone from the desk the same day, the only question would seem to be, whether the proof is sufficient to show that it went from the desk directly into the post-office. For if so, that will charge the defendant, although the notice never reached him. After that the conveyance is at his own risk.¹ And if it did not go direct to the post-office, there is no certainty how long it might have been delayed, or indeed whether it ever reached the defendant, except that he had it in possession many months after.

The cases are undoubtedly very strict upon this point, as they should be, in requiring very great certainty of proof of depositing the notice in the post-office. But the cases certainly do not require that this should be proved by a single witness, who can swear positively that he deposited the notice in the proper place. This, in practice, in large commercial cities, where the vast majority of such cases arise, would seem not generally to be the course of doing such things. The depositing of such letters in the post-office, as of other notices, is perhaps more generally done, in such places, by porters and messengers. But it would seem to be the rule, that all who had any thing to do about the matter of depositing the notice should be called. Is this shown to have been done in the present case?

It would seem, from the testimony, that this bank had a cashier and three clerks to transact the business. There is nothing to indicate that any other persons had any thing to do with sending notices of dishonor of bills and notes generally, or in this case in particular. From the fact that Case was upon the stand, and that the uncertainty of this notice was made a leading point in the trial, we may fairly presume, perhaps, that if there had been others, having probable connection with the transaction, whose testimony was not taken by the plaintiffs, which would very much tend to increase the uncertainty, we should have been apprised of that fact.

From the testimony of Case it seems that it was the special duty of Case, the first clerk, to make out and deposit in the post-office, or see that it was done, all such notices. The cashier does not seem to have had any connection with this notice, or to have been expected, ordinarily, to have any thing to do with such notices, except probably to give directions when applied to by Case, as in the present case. It was the daily and special duty of Belden, the

¹ See *Munn v. Baldwin*, ante, 376, and note.

youngest clerk, to take all letters from the bank to the post-office, and in his absence the same duty devolved upon White, the next older clerk, and in the absence of both, the duty devolved upon Case. None but the officers of the bank had access to Case's desk. The letter was deposited in the proper place for them to take to the post-office, or where they often took them. They both testify that at this date it was their business, in the manner and order stated by Case to carry letters from the bank to the post office, and that they often took letters from Case's desk for that purpose, and that if they took any letter on that day, or any other, they carried it to the post-office the same day. There is no pretence of any motive in any officer of the bank to detain the letter, or that they would be liable to do so by mistake, or indeed that any others but those named had access at the time to the desk of Case, although it is probable the directors must have had. But the probability of their carrying off such a letter, by design or mistake, is quite too remote to be taken into the account. It is, perhaps, quite as probable that one of the clerks might have lost it upon the way to the post-office, without being aware of the loss, and really suppose he delivered it at the post-office, and that is not a contingency which is ever taken into the account of uncertainties in such cases.

We may say here, then, safely, that all the persons having any connection with the business of depositing the letters of this bank, at that time, in the post-office, or who would be likely, upon any rational conjecture, either by design or mistake, to take such letter from the desk, have testified explicitly that if they did take it up from the desk, they deposited it in the post-office the same day. In addition to this, the notice is found to have reached the defendant at some time. And we have before said, if the letter had been dropped by mistake, or purloined, it would in all rational probability never have reached its destination. Can there be, then, any longer any reasonable doubt of the deposit of this letter in the post-office the same day it was written? We think not. The evidence rises to a sufficient degree of certainty to answer any demand, even in a criminal court, if it be of the proper quality.

The authorities relied upon to show this was not the case, do not seem to us to establish any such proposition.

The proposition in Mr. Chitty's Treatise upon Bills, that it is incumbent upon the holder "to prove distinctly and by positive

evidence that due notice was given, and that it cannot be left to inference or presumption," seems to be based altogether upon the case of *Lawson v. Sherwood*, 1 Stark. 314, a mere *nisi prius* decision. The language of the author seems to be taken from the case. But the case seems to justify no such rule of proof, as to cases generally of this kind. The witness there testified that he gave notice in either two or three days, three days not being in time, which is no testimony at all of the fact of legal notice. It leaves the probabilities precisely equal, whether notice was given or not, which is precisely no proof at all. Any one who knew nothing about the case, might safely testify that he either did give notice, or did not, which is this case as reported.

And the next proposition of the same author is equally unsupported by the cases referred to. It is that "the party who puts a letter, giving notice of the dishonor of a bill, into the post-office, must be able to swear to a certainty, and not doubtfully, that he put the letter in himself, and not that he was doubtful whether he did not deliver it to another clerk to put it in." The case referred to is *Hawkes v. Salter*, 4 Bing. 715. The difficulty here was, that the witness could not swear whether *he* put the letter in the post-office, or another clerk did it, and the testimony of the other clerk was not taken in the case; so that there was, in fact, no testimony to connect the letter with the office. And the case of *Toosey v. Williams*, 1 Moody & M. 129, although more in point for the defendant, as it seems to me, than any other cited, is by Lord *Tenterden* put upon the ground that, after the letter was copied by the clerk, it had to go into the defendant's hands to be sealed, and there was nothing in the case to show that he ever returned it to the clerk whose business it was to convey it to the post-office, and who testified very much as the two younger clerks do here. But here the letter is shown, to a moral certainty, to have been taken by the clerks, and they testify, if they took it, they deposited it in the post-office the same day. The case of the *Bank of Vergennes v. Cameron*, 7 Barb. 143, a note of which was read to us, seems to be a case where there was no proof of notice, except the notice being in the indorser's hands after the time for giving it had expired. It could not from that be inferred, of course, that it was given in time.¹ But, in the present case, it is shown that if the notice was ever deposited in the office, it was done in time, and the notice

¹ See *Smedes v. Utica Bank*, 20 Johns. 372.

being in the defendant's hands, is strong confirmation of the notice having reached the office in due time.

On the other hand, the reasoning of Lord *Ellenborough*, in *Hetherington v. Kemp*, 4 Camp. 193, whose opinions are always regarded as good evidence of the law, shows very fully that the evidence in the present case ought to be regarded as sufficient. "Had you called the porter," says his lordship, "and he had said that, although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the table, this might have done." "A letter was then put in from the defendant," acknowledging the receipt of a letter of the proper date from the plaintiff, and Lord *Ellenborough* said he would presume this was the letter written to inform him of the dishonor of the bill, although nothing was said of that in the defendant's letter.

The case of *Miller v. Hackley*, 5 Johns. 375, is a case where far more uncertain evidence than the present was held sufficient.

In this last case, the witness, being the notary who protested the bill, only testified that it was his usual course to send notices by mail, deposited on the evening of the same day of protest, and that he believed he did so in the present case, and it was held sufficient. We think there is no question the proof in the present case should have been held competent to prove notice to the defendant of the dishonor.

Judgment reversed, and case remanded.

See next case and note.

THE COMMERCIAL BANK OF ALBANY v. MERRITT CLARK.

(28 Vermont, 325. Supreme Court, February, 1856.)

Admissions. Notice. — A written admission by the indorser of a bill or note, that he received due notice of its dishonor, though strong evidence, is not conclusive of the fact against him. He may show that the paper was signed under a misapprehension or mistake as to the bill or note referred to, and that no notice of the dishonor was, in point of fact, given.

Contract. Estoppel. — Such a writing, in the present case, held not to operate either as an admission for the purpose of a trial, as a contract, or as an *estoppel in pais*.

ASSUMPSIT upon a bill of exchange against the defendant as indorser. Plea, the general issue; trial by the Court, September term, 1855, — PIERPOINT, J., presiding.

The plaintiff introduced the bill of exchange counted upon, with the notarial certificate of protest, together with a writing signed by the defendant, of which the following is a copy, viz. : —

“Commercial Bank of Albany v. M. Clark. Rutland County Court, Sept. Term. June 6, 1855. I, Merritt Clark, defendant in the above entitled cause, acknowledge and say that I had legal and due notice by mail of the protest of non-payment of the bill of exchange or draft described in the above-entitled cause, and on which I am an indorser, with other indorsers on same bill.”

It appeared that the foregoing admission of the defendant was drawn up by the attorney for the plaintiff, and enclosed to the defendant in a letter, of which the following is a copy : —

“M. Clark, Esq. Dear Sir, — If the enclosed admission is signed by you, it will save cost and trouble of taking testimony in N. Y., to prove notice. If declined, I am going to N. Y. last of next week, and shall issue notice of the time and place, &c., of taking the deposition, to prove notice to you as indorser. . . .

“Respectfully yours,”

and that, in answer to said letter, the admission was returned, signed by the defendant.

The defendant offered testimony to show that said writing was signed by him under a misapprehension of the facts, and that at the time he signed it he had in his mind a different draft from that described in the writ, and that no notice of the protest or non-payment was ever sent to or received by him ; and offered to accompany this with proof that, immediately upon discovering his mistake, he informed the plaintiff's attorney thereof, both by letter and verbally, and that he should not abide by the concession or admission, and that he withdrew it.

To this testimony the plaintiff objected, on the ground that, whether true or not, the defendant was concluded by his written concession, and could not thereafter show the fact to be different. This objection was sustained by the Court, and the testimony excluded. Judgment for the plaintiffs. Exceptions by the defendant.

ISHAM, J. The bill of exchange, on which this action is brought, was duly protested for non-payment. The notice to the defendant, as indorser, of its dishonor, was proved on the trial of the case by his written acknowledgment, in which he admitted that he did

receive due and legal notice of the protest and non-payment of the bill. That acknowledgment was full and strong proof that such notice was in fact given to the defendant, and it is not competent for him to avoid or weaken the effect of that admission, by notifying the plaintiffs that he should not abide by that statement, and that he withdrew it. It will always be evidence against him whenever the question arises whether he had notice of the dishonor of that bill. The question in the case now arises, whether that admission is conclusive upon the defendant; or whether it is competent for him, on the trial of the case, to introduce testimony to show that it was made under a misapprehension of facts, and with reference to another bill of a similar character. That testimony, in connection with evidence showing that, in fact, no notice whatever was ever given to the defendant of the dishonor of the bill, was offered and rejected by the Court. It is insisted that the testimony offered was inadmissible, as the written admission was made for the purpose of a trial, and that it is for that reason conclusive upon him. On this question, it is sufficient to observe that the cases on that subject have no reference to admissions made out of Court, though they were made with the understanding that they would be used as evidence, on the trial of a particular case. Those admissions only are referred to, which are made by a party, or his attorney, during the progress of a trial, and as a substitute for legal evidence. Admissions of that character, as a general rule, will be conclusive, for that trial at least, as they become a part of the record of the trial. The same rule may apply to admissions made out of Court, when they are entered, as is sometimes practised, upon the calendar or records. 2 Phil. Evid. by Cowen, 200; note 192. When the admissions are not of that character, and he is in no way concluded by the records of the case, they are not rendered conclusive upon him, as being admissions made for the purpose of a trial. The acknowledgment, in this instance, is not of that character, and does not fall within that class of cases, as they are recognized in this State.

It is very clear, that the testimony offered by the defendant is not objectionable as contradicting or in any way affecting a written contract or writing. If this written acknowledgment contained any provisions placing it in the light of a written contract of the parties, the objection would merit a different consideration. But it is not of that character. It has none of the elements of a

contract, nor was it designed for one. It is merely an admission that notice had been given, the same as a receipt is an acknowledgment of a settlement in full, or of a receipt of money for a particular purpose; or indorsements upon a note, which are written acknowledgments that so much has been paid. In all these cases the authorities are uniform, that, if the receipt or the indorsement was made by mistake, and under a misapprehension of facts, though they are evidence against the party, yet they may be explained, controlled, and contradicted by parol evidence, and the mistake of the party corrected, and the truth given in evidence. 1 Aik. 311; 2 Vt. 138; 9 Vt. 41; 5 Johns. 68; 1 Greenl. Evid. § 305.

There is nothing in the case, as it now stands, that renders that testimony inadmissible, on the ground that the written acknowledgment operates as an *estoppel in pais*. That doctrine applies in cases of fraud, where some act has been done, or statements made, with a fraudulent intent, and with a view to induce a line of conduct which otherwise would not have been taken, and from which advantages have been derived. When the case is destitute of those considerations, there is no ground upon which the application of that doctrine can be made. The doctrine was so held in the case of *Wakefield v. Crossman*, 25 Vt. 298, 301. It was upon that ground the case of *Daviess v. Burton*, 4 Car. & P. 166, was decided. The party in that case agreed to admit certain facts on the trial, and for that admission he was not to be held to bail. The admission was held conclusive, as it had induced a line of conduct which would not otherwise have been pursued; for, upon the strength of it, the right to insist upon bail had been surrendered. It was not a mere acknowledgment, but it assumed the character of an agreement or stipulation of the parties, and therefore the party was concluded by it. There is no pretence that this admission was made with a fraudulent intent, and from which the defendant has received any advantages. It was an admission against his interest, and designed for the accommodation of the plaintiffs. In the case of *Heane v. Rogers*, 9 Barn. & C. 577, *Bayley, J.*, observed, that "there is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or untrue, and that he is not estopped or concluded by them, unless another person has been induced to alter his condition by them." The case of *Jones v.*

O'Brien, 26 Eng. Law & Eq. 283, is a direct authority on this subject. The question in that case was, whether notice of a dishonor of a bill had been given, and which was proved by a written promise to pay the bill. The defendant was permitted to introduce evidence showing that no such notice was given. He was not estopped from making that defence by his promise. It may be true that the testimony offered in this case, as it was in that, may be insufficient to overcome the evidence of the written acknowledgment; but that relates to the credibility of the testimony, not its competency. It is proper evidence to be taken into consideration and weighed by the jury. In Byles, Bills, 350, it is said that "after a bill is due, a promise to pay it, or an admission of a liability upon it, by a drawer or indorser, will be evidence not only that due notice of its dishonor was given, but that it was duly presented." The same rule applies, whether the promise to pay the bill, or the liability on it, was by parol or in writing. In either case, it is strong evidence of notice against the party making it; but the authorities are decisive upon the question, that it is competent for the party to prove that the promise, or admission, was made under a misapprehension of facts, and that in fact no notice of dishonor was ever given. Story, Bills, § 320, and note; Chitty, Bills, 535-539. In all these cases the party is not concluded from introducing that evidence, on the ground that it contradicts any written stipulation, nor as a matter of estoppel.

The judgment of the County Court must be reversed, and the case remanded.

The two preceding cases discuss questions of considerable practical importance in regard to the kind and degree of proof admissible or required in establishing demand of payment on commercial paper and giving notice of dishonor to the parties interested. We are not aware that the rules of evidence here declared have since been essentially modified.

I. The first point illustrated by Strong's case is the disposition of the courts not to release the responsibility of the parties to negotiable paper upon the merest trifling irregularity, where the substance of the requirements of the law has been complied with. There was at one time a degree of strictness of construction upon questions affecting demand of payment and notice of dishonor of negotiable paper, amounting almost to a denial of justice; as if indeed there was something specially meritorious, in finding some plausible ground upon which to release all parties collaterally holden for the payment of a bill or note. That intense degree of strictness of construction almost requiring certainty to a certain intent in every particular, which was at one time applied to numerous questions affecting matters not considered the special favorites of the

courts, such as estoppels, orders of removal in settlement cases, the title to land derived under tax sales and some others, as well as that under consideration, has certainly been relaxed. The question under consideration is ably and judiciously commented upon by Mr. Justice *Eastman*, in *Manchester Bank v. Fellowes*, 8 Foster, 302. The cases are here very largely quoted and discussed. The case of *Warren v. Gilman*, 17 Me. [5 Shepl.] 360, bears upon this question, and the opinion of *Weston, C. J.*, contains many valuable suggestions. From the cases and the text-writers upon this subject it is apparent that all which is now required in regard to giving notice of the dishonor of negotiable paper is the exercise of that degree of diligence which careful and prudent men put forth in their own business of equal importance. Story, *Promissory Notes*, § 335, *et seq.*, citing *Chitty on Bills*; *Bayley on Bills*. But where definite rules have been established by the common consent of commercial men, either as to the time, or place, or manner of giving such notices, or making demand of payment, they must be followed; not so much, necessarily, because they are absolutely the wisest and best which could be supposed, but more because, having been established and acted upon by common consent, they will be presumptively reasonable, and others will naturally depend and act upon them; and if any one were at liberty to disregard them it would naturally lead to disappointment with others, and might lead the latter into conduct different from what they would otherwise take. Hence such rules, when once established, must be followed, unless there is some necessity for pursuing a different course in the particular case.

As to the degree and kind of proof to be required in such cases, there seems to be no reason why any different rules or constructions should obtain, as to certainty, from those which are regarded as salutary and sufficient in other cases and upon other subjects.

II. The point discussed in *Clark's case* is also one of considerable practical importance. There have been some few cases holding that where the indorser is once released by want of notice in time, a mere waiver of such notice or acknowledgment of the same, or a promise to pay the bill, will not bind him, unless made upon some new consideration. *Bronson, J.*, in *Tebbetts v. Dowd*, 23 Wend. 379, 412, contends for the soundness of this view, upon principle, although he confesses the weight of authority is against the view. And the contrary is held in the late case of *Neal v. Wood*, 23 Ind. 523. But the law, as laid down by *Coren, J.*, in *Tebbetts v. Dowd*, that a promise to pay the note or bill after the time for demand and notice has passed, is presumptive evidence of such demand and notice having been regularly made, seems clearly established. But where it appears on trial that the holder was guilty of laches in regard to making such demand and notice, he cannot recover upon a subsequent promise of the indorser, without showing that he knew of such laches at the time of making the promise. But upon principle it would seem that any admission of liability upon, or promise to pay a bill or note, based upon the belief or representation that it had been dishonored by the acceptor or maker, which must be the natural inference, where such admission is made after the time of payment has elapsed, can only be regarded in the nature of evidence and as such liable to be rebutted or shown to have been made under misapprehension, the same as any other admission which has not led the opposite party into any different course of

conduct from what he would otherwise have adopted. It being settled that such promise need not be made upon any new consideration, and that it must, in order to be binding, be made with full knowledge of the facts in the case, there can be no reason whatever to exclude proof of any matter which might tend to break the force of such admission, whatever that may be. But it would scarcely be useful to go more into detail upon this question, which when fully analyzed will be found to depend upon very simple and familiar principles of the law of evidence, and much the same which applies to other cases of admission or declaration by a party against his interest. See *Hazelton v. Colburn*, 1 Rob. La. 345.

The late English cases are all in one direction in regard to the effect of a promise to pay a note or bill by the party entitled to notice of dishonor. If the promise is made before the bill or note falls due, that amounts to waiver of demand and notice of the default of other parties; and if made after the time of dishonor it amounts to an admission of demand and notice at the proper time and in proper form. *Cordery v. Colvin*, 9 Jur. N. S. 1200; S. C., 14 C. B. N. S. 374, opinion by *Byles, J.*; *Woods v. Dean*, 3 Best & S. 102; *Bartholomew v. Hill*, 10 W. R. 273. See *Sigerson v. Mathews*, *ante*, 473, and note.

And it does not seem that the effect of a promise to pay the bill or note after the time of payment has elapsed, is answered or in any way qualified, by the fact appearing that due notice of dishonor was not in fact given. *Killby v. Rochussen*, 18 Com. B. N. S. 357; *Rabey v. Gilbert*, 6 Hurl. & N. 536; S. C., 9 W. R. 386. But unquestionably it may be shown that the admission or promise was made under mistake or misapprehension, and thus its effect be defeated. And where a question arises in regard to the sufficiency of notice of dishonor by reason of its indefiniteness, it may be submitted to the jury how far the party was thereby deceived. So also it may be submitted to a jury whether the holder of a note or bill exercised a reasonable degree of diligence in finding the parties and giving notice of dishonor, although not given within the ordinary time. *Gladwell v. Turner*, Law Rep. 5 Exch. 59. There are no other English cases of recent date bearing directly upon these questions; and they all treat the admissions by way of promise or otherwise, of the party entitled to notice of dishonor, or merely in the nature of evidence, to be weighed in connection with all the other evidence in the case, with the ordinary qualification that where such admissions have induced different action in other parties from what would otherwise have been taken, the party making them will be estopped from withdrawing or qualifying them. This subject is more fully considered under EXCUSES OF PRESENTMENT AND NOTICE, and particularly in *Berkshire Bank v. Jones*, *ante*, 468 and note, and in *Sigerson v. Mathews*, *ante*, 473, and note.

In the American courts it has been held improper to submit to the jury the question of the reasonableness of the presentment of a bill payable on sight, where the same was not presented for twenty-one days after it might have been in the due course of communication between the residence of the payee and the drawee, and there was no evidence to account for the delay. *Phoenix Insurance Co. v. Allen*, 11 Mich. 501; *Same v. Gray*, 13 id. 191; *Walker v. Stetson*, *ante*, p. 189. Bills of exchange between the different American States are held foreign for the purpose of admitting the certificate of the notary as *prima facie* evidence of demand and notice. *Orono Bank v. Wood*, 49 Me. 26; *Starr v. Sanford*, 45 Penn. St. 193; *Lee v. Buford*, 4 Met. (Ky.) 7. And where a bill is

duly protested for non-acceptance, it need not be again presented and protested for non-payment. *Plato v. Reynolds*, 27 N. Y. 586. The diligence required in giving notice of the dishonor of a note or bill is such as men of business usually exercise, when their interests depend upon obtaining correct information. *Palmer v. Whitney*, 21 Ind. 58. The holder of a draft, as between himself and the drawer is not bound to present it at maturity. But if he do not he incurs the risk of the insolvency of the drawee. *Springfield Ins. Co. v. Tineher*, 30 Ill. 399. But a delay of two years is fatal. *Bridgeford v. Simonds*, 18 La. An. 121. The mere want of effects in the hands of the drawee will not always excuse presentment and notice. *Saul v. Jones*, 1 Ellis & Ellis, 59. See *Hopkirk v. Page*, *ante*, p. 430, and note.

As to the necessity of the presentation of bills and notes for payment, see *Gay v. Haseltine*, 18 N. Hamp. 530; *Benton v. Martin*, 31 N. Y. 382; *Sheldon v. Chapman*, 31 N. Y. 614; *House v. Adams*, 48 Penn. St. 261, cited in full in note to *Hopkirk v. Page*, *ante*, p. 413.

DISCHARGING INDORSER OR DRAWER.

[HAVING considered commercial paper in its regular stages from inception to suit inclusive, we now present a number of important miscellaneous cases upon branches of the general subject, of every-day occurrence in the courts, not already fully illustrated.

The subject of presentment and notice has already been considered, under PRESENTMENT AND DEMAND FOR PAYMENT, PROCEEDINGS ON NON-PAYMENT, and EXCUSES OF PRESENTMENT AND NOTICE; and we here introduce other matters relating to the discharge of the indorser or drawer.]

STERLING v. THE MARIETTA AND SUSQUEHANNA TRADING COMPANY.

(11 Sergeant & Rawle, 179. Supreme Court of Pennsylvania, May, 1824.)

Additional security. — Taking a bond from a third person for the money due upon a note is no discharge of an indorser, unless it be so agreed; nor will proceeding to judgment on the bond alter the case.

Delaying suit. — Neither giving time to the maker, by forbearing to proceed to recovery on the paper by legal process; nor delay to sue the indorser for several years, within the period of limitation, will operate as a discharge to the indorser; provided no time was given before the indorser's liability was fixed..

THE case is stated in the opinion of the Court.

TILGHMAN, C. J. This is an action brought by The Marietta and Susquehanna Trading Company against Daniel Sterling, the plaintiff in error, on a promissory note for \$1350, dated June 16, 1814, drawn by Wait S. Skinner, payable to the said Daniel Sterling, or order, at Henry Cassel's banking-house, one hundred and seventeen days after date, and indorsed by the said Sterling and Christian Shirk. This note was regularly protested for non-payment, of which notice was given to the indorsers. On the twenty-fifth of February, 1815, Isaac Osterhauk, Charles Otis, and John Buckingham, gave their bond to Wait S. Skinner (on which judgment was afterwards confessed in the Court of Common Pleas of Luzerne county), for the use of Henry Cassel's bank, at Marietta, for \$1350, with interest to be paid on the first of May, 1815. This bond

was given expressly as a collateral security for the note on which this suit was brought, and was assigned by the obligee to The Marietta and Susquehanna Trading Company on the fifteenth of July, 1819. Henry Cassel's bank and The Marietta and Susquehanna Trading Company may be considered as one. In the month of June, 1814, Cassel's bank ceased to do business, and the business was from that time carried on in the name of the Marietta and Susquehanna Trading Company, of which Cassel was president, until November, 1817. On the trial, in the Court below, the defendant (Sterling) offered in evidence the depositions of Osterhauk, Otis, Buckingham, and Skinner, all of which were excepted to by the plaintiff, and rejected by the Court, and in my opinion very properly. Osterhauk, Otis, and Buckingham were interested in the event of this suit, having given their bond and judgment as a collateral security; so that if a verdict and judgment had passed for the defendants, they would have been discharged from the judgment entered on their bond. Skinner was interested also as drawer of the note. It was an accommodation note, and if the defendant had succeeded in this suit, Skinner would have been altogether discharged: so that his interest was immediate.

The defendant next requested the Court to charge "that if the plaintiff took a bond for the payment of this note from any other person, before this suit was brought, without the knowledge or consent of the defendant, and obtained judgment on the said bond, the defendant would be thereby discharged, and the jury should find in his favor." But the Court charged that, in such case, the plaintiff would be entitled to a verdict. The taking of a bond from a third person was no more than a collateral security for the money due on the note, and would be no discharge of the drawer or indorsers, unless so agreed. Why should it? Why might not the plaintiffs strengthen themselves by additional security, without discharging the original debtors? Such transactions are very frequent. All depends on the intent of the parties. If they agree that the drawer and indorsers shall be discharged, they will be discharged. But if it be not so agreed, the presumption is that it was not so intended, and they will still be held liable. The proceeding to judgment on the bond taken as collateral security would not alter the case. The judgment would be of the same nature as the bond; that is to say, it would be but collateral security for the debt due on the note.

The last question put to the Court by the counsel for the defendant was as follows: "If the plaintiffs took a judgment bond, entered up the judgment, issued process upon it, gave time to the drawer of the note (Wait S. Skinner), without the defendant's knowledge, and have delayed bringing suit against the defendant (one of the indorsers of the said note) for several years, by such arrangement, proceedings, and delay, the defendant is discharged." On these points also the opinion of the Court below was against the defendant. I have said already that the taking of a bond as a collateral security, and proceeding to judgment on it, is no discharge of the original debtor. Neither is the giving of time, in the manner it was here given (that is to say, by forbearing to proceed to the recovery of the money by legal process), a discharge, provided no time was given till after the note was protested. If the original time of payment had been enlarged without the consent of the indorsers, they would have been discharged. But the money having been demanded, the note protested, and notice given to the indorsers, they are fixed, and the holder of the note may afterwards delay his suit as long as he pleases, without injuring his security. By the notice to the indorsers, they are given to understand that they are held liable, and nothing but payment will discharge them. The holder may sue all or any of them. He may pursue one, and indulge the others, or he may indulge them all, and proceed at any time against any of them, provided he keeps within the act of limitations.

The charge of the Court, therefore, was in all respects correct. But, for the error in rejecting the receipt of Henry Cassel, offered in evidence by the defendant, the judgment must be reversed, and a *venire de novo* awarded.

There is considerable conflict as to the first proposition in this case, respecting taking security payable at a future day; and although the principal case is supported by several cases emanating from high authority, the weight of decision seems opposed to it, if the security taken had the effect to suspend the holder's right of action. *Okie v. Spencer*, *infra*, 547. See also *McLemore v. Powell*, *post*, 551; *Michigan State Bank v. Leavenworth*, 28 Vt. 209. Cases which favor the rule above declared are *Pring v. Clarkson*, 1 Barn. & C. 14; *Ripley v. Greenleaf*, 2 Vt. 129. See also *Story, Promissory Notes*, § 416, and cases cited.

The second point is well settled, that so long as the holder remains passive, after having fixed the liability of the drawer or indorser, he does not lose any rights. *McLemore v. Powell*, *post*, 551; *Couch v. Waring*, *post*, 563.

OKIE v. SPENCER.

(2 Wharton, 253. Supreme Court of Pennsylvania, December, 1836.)

Additional security. Extension of time. — If the holder of a promissory note take a check upon a bank from the maker, dated six days after the maturity of the note, the check to be in full satisfaction of the note if paid, this operates as an extension of time to the maker, and discharges an indorser.

At the maturity of the note in question, the holder took from the maker a draft on other parties, payable six days afterwards, to be in full satisfaction of the note if duly paid.

KENNEDY, J. The defendant here having indorsed the note in question, for the accommodation of the drawer, and therefore being regarded as a surety merely, it is admitted that if further time was given, when it fell due, by the holder to the drawer, for the payment thereof, the defendant is thereby discharged. And the only question to be decided is, whether from the facts set forth by the defendant in his special plea, to which the plaintiff has demurred, the law will imply an agreement made on the third of May, the day the note became payable, by the holder of it, to give further time until the sixth of the same month, to the drawer for the payment thereof.

Had the defendant pleaded the general issue only, and under it, as he certainly might, given evidence of the facts set forth in his special plea, and the truth of them had been clearly established by the evidence or the admission of the plaintiff, without more having been shown to the jury, it would undoubtedly have been the duty of the Court to have instructed the jury that the facts thus established, implied an agreement on the part of the holder of the note, for an adequate consideration received by him, to give time to the drawer for the payment of it, without having the consent of the defendant; and that the latter was thereby discharged from his liability as indorser. In the absence of all proof to the contrary, it cannot be supposed here, that the drawer, when the note had become payable, could have had any other motive for giving the check of himself and his partner, securing the payment of it at the expiration of six days, than that of procuring indulgence for that space of time upon his note from the holder of it.

That such, too, must have been the understanding of them both at the time, seems to be the necessary inference* from the facts stated, if our judgments are to be guided in this respect by what we know to be the common and ordinary motives which generally influence and produce such arrangements. Marshall, the partner of the drawer of the note, does not appear to have been bound for the payment of it in any way before it fell due, which tends generally to strengthen, and in truth to make the inference that the check was given to procure further time for the payment of the note, irresistible. And although the check cannot be considered as having been taken in satisfaction of the note, nor as having extinguished it, yet the right of the holder to proceed against the drawer to enforce the payment of it, by suit, was thereby suspended until after the expiration of the six days. It was in effect changing, without the consent of the defendant, the terms upon which he had agreed as indorser to become liable for the payment of the note, and depriving him of the right to pay the note at maturity, if the drawer failed to do so, and then to sue him immediately for it, and therefore amounted to a release of him from his liability. He had guaranteed by his indorsement, the payment of the note on the third of May, 1833; and it was not competent for the holder and the drawer without his concurrence, to extend his guaranty to the ninth of that month, which would clearly have been the effect of their agreement and the giving of the check, if the defendant were still to be held liable for the payment of the note. That the holder, by accepting the check, put it out of his power to proceed on the note, by suit against the drawer, until after the six days, cannot, as it appears to me, be controverted upon any ground that would seem to be consistent with the nature of the transaction, and what must have been the intent of the parties. Had the drawer given his own check merely, for the payment of the note at the expiration of the six days, there might have been some color for saying that he had not thereby precluded himself from bringing suit on it during that period; because it might then have been argued with great plausibility, if not correctly, that he had obtained by it no additional security, and consequently no adequate consideration to make a promise of indulgence binding; that by the check he acquired nothing except the personal responsibility of the drawer, which he had before by virtue of the note; and therefore had he even made an express promise of indulgence for the six days, it might have been alleged

that he would not have been bound by it for want of a sufficient consideration ; but as the case is presented by the special plea and demurrer, no such argument can be advanced or pretended ; for by the check, the holder of the note received the additional responsibility of Marshall, as a security for the payment of it ; and it would therefore seem almost impossible to imagine any other reason for giving such additional security, than that of procuring an extension of payment for the six days. It is true, that it may seem to have been but a short indulgence ; but being a suspension of the right of the holder of the note to sue the drawer upon it during that period, it operated as effectually to discharge the defendant from his liability, as if it had been six years ; for in either case, to hold the defendant to be still bound by his indorsement, would be making him liable upon terms, and in short, for the fulfilment of a contract, different from what he had agreed to. The time of payment mentioned in a note, is always a very material part of it ; and if it may be enlarged without the consent of the indorser, and he notwithstanding, be held liable upon his indorsement, there is no reason why the amount may not also be enlarged ; but it is obvious, that nothing of the kind can be done, without operating great injustice towards him ; and therefore it is, if it be done, it shall release him from his liability. Every man, as long as he is a free agent, must be permitted to declare the terms upon which he is willing to incur an obligation ; and having done so, it cannot be altered in any material point whatever, without his consent ; nor yet any thing be done which may affect his rights in relation thereto.

The counsel for the plaintiff has cited in opposition to this, the case of *Pring v. Clarkson*, 1 Barn. & C. 14 ; s. c., 8 Eng. Com. Law, 10, where a bill of exchange having been dishonored, the acceptor transmitted a new bill for a larger amount to the payee, without having had any communication with him respecting the first : the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards for a valuable consideration, indorsed it to the plaintiff. It was held that the second bill was merely a collateral security, and that the receipt of it by the payee, did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer. Mr. Chief Justice *Abbott*, in pronouncing the opinion of the Court, says : " In no case has it been said, that taking a collateral security from the

acceptor, shall have that effect ;” that is, of discharging the other parties to the bill : and concludes by saying, “here the second bill was nothing more than a collateral security.” Now it is not easy to perceive why a collateral security should not have such an effect ; for surely there is nothing in the nature of it which renders the giving or the taking of it inconsistent with the holder’s agreeing to give time to the acceptor of a bill or the drawer of a note. On the contrary, such indulgence may be, and doubtless is in most cases, the very consideration upon which the collateral security is given and obtained ; and as I have endeavored to show, makes the case, in the absence of proof of an express agreement to give time, still stronger in favor of an implied agreement to that effect, than where there is nothing more given than a bare renewal of the promise by the acceptor of the original bill, or the drawer of the former note, to pay the amount at a future date. But Chief Justice *Abbott* was mistaken, when he said, “in no case had it been said, that taking a collateral security from the acceptor shall have that effect ;” for in *Gould v. Robson*, 8 East, 576, decided some fifteen years before, it was not only said, but the case itself turned upon the very point. There the holder of the bill of exchange, who when it fell due, after taking part-payment of the acceptor, agreed to take a new acceptance from him for the remainder, payable at a future day, but in the mean time, the holder to keep the original bill in his hands as security ; and it was held that it amounted to a giving of time, and a new credit to the acceptor, and therefore discharged the indorser. Besides, the authority of *Pring* and *Clarkson* has been doubted by the profession. Mr. Chitty in his *Treatise on Bills*, 442 (8th Eng. ed.), after repeating the principle laid down in it, adds, “but it is submitted that the mere receiving further security, payable at a future day, would in general imply an engagement to wait till it becomes due.” See also *Bayley, Bills* (5th ed.), 345, note 31 : and *Chitty, Jr., Bills* (ed. of 1834), 100 w. a. note 1 ; and in *Kendrick v. Lomax*, 2 C. & J. 405, it would seem to be overruled ; for it was decided there, that the holder, by taking a renewed bill, impliedly agrees to give time until it becomes due, and cannot sue in the interim, on the original bill.

Judgment affirmed.

See to the same effect *Bangs v. Mosher*, 23 Barb. 478 ; but see *Sterling v. Marietta, &c., Trading Co.*, *ante*, 544, and note.

McLEMORE, Plaintiff in Error, v. POWELL AND OTHERS.
Defendants in Error.

(12 Wheaton, 554. Supreme Court of the United States, January, 1827.)

Agreement for delay. — Mere agreement by the holder with the drawer of a bill of exchange for delay, made without consideration, and not communicated to the indorser, does not discharge the indorser.

THE case is stated in the opinion of the Court.

STORY, J. This is a writ of error to the Circuit Court of the United States for the District of West Tennessee.

The original action was assumpsit, brought by Powell, Fosters, & Co., as holders of a bill of exchange, drawn by one Thomas Fletcher, in May, 1819, at Nashville, upon Messrs. McNeil, Fisk, and Rutherford, at New Orleans, payable to Thomas Read, or order, for two thousand dollars, in sixty days after date, and by him indorsed to the defendant, John C. McLemore, and by him to the plaintiffs. The bill, upon presentment for acceptance, was dishonored, and due notice of the dishonor was given to the defendant.

At the trial, upon the general issue, Thomas Fletcher, the drawer, was, under a release from the defendant, McLemore, examined as a witness, and among other things, testified that, in the month of October following the dishonor of the bill, "one of the plaintiffs applied to him at Nashville for the money on the bill, and threatened to sue immediately if an arrangement was not made to pay the bill. The witness then proposed to the plaintiff, if he would indulge him four or five weeks, he would himself, to a certainty, pay the bill. To this the plaintiff agreed, and told the witness he was going to Louisville, Kentucky, and would return by Nashville, about the expiration of that time, and would receive said payment. Since said time the witness has never seen said plaintiff." The witness farther testified, that the defendant was an accommodation indorser for him on the bill; that the plaintiff told him that the bill would be left with a Mr. Washington, at Nashville; that he expected he would himself be at that place at the time agreed on, but that, if he did not come, he would give

the instructions to Mr. Washington, by letter, what to do if the witness did not pay at the expiration of the time agreed on. It did not appear that any consideration was paid or stipulated for this delay; and no suit was commenced until after this period had elapsed. The district judge instructed the jury, that if they believed the conversation above stated amounted to no more than an agreement that a suit should not be brought for four or five weeks, and that no premium or consideration was given or paid, or to be paid by Fletcher, the indorsers were not discharged, that an agreement for giving day must be an obligatory contract for a consideration which ties up the hands of the creditor, and disables him from suing, thereby affecting the interests and rights of the indorser; that the indorser has a right to require and demand of the creditor to bring a suit against the drawer, and if he has disabled himself from bringing a suit by a contract for a consideration, he has thereby released the indorser; and that if the jury were satisfied from the testimony that time was given for a valuable consideration paid or to be paid, or that a new security was taken by the holder, that the indorser was discharged and absolved from all the obligations of the indorsement.

Under this instruction, the jury found a verdict for the plaintiffs, upon which there was judgment given in their favor. A bill of exceptions was taken to the charge of the Court; and the present writ of error is brought for the purpose of ascertaining its legal correctness.

It is unnecessary to give any opinion upon that part of the charge which respects the right of an indorser to require the holder to commence a suit against the drawer. In general, the indorser, by paying the bill, has a complete power to reinstate himself in the possession and ownership of the bill, and thus to entitle himself to a personal remedy on the instrument against all antecedent parties. The same reason, therefore, does not exist, as may in common cases of suretyship, to compel the creditor to active diligence by suit against the principle. Without expressing any opinion on this point, it is sufficient to say, that the error, if any, was favorable to the defendant, and, therefore, it can form no subject of complaint on his part.

The case then resolves itself into this question, whether a mere agreement with the drawers for delay, without any consideration for it, and without any communication with or assent of, the in-

dorser, is a discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself. And we are all of opinion that it does not. We admit the doctrine, that although the indorser has received due notice of the dishonor of the bill, yet if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But, in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it. An agreement without consideration is utterly void, and does not suspend for a moment the rights of any of the parties. In the present case, the jury have found that there was no consideration for the promise to delay a suit, and, consequently, the plaintiffs were at liberty immediately to have enforced their remedies against all the parties. It was correctly said by Lord *Eldon*, in *English v. Darley*, 2 Bos. & Pul. 61, that "as long as the holder is passive, all his remedies remain:" and, we add, that he is not bound to active diligence. But if the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill for the stipulated period; and if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If, therefore, such a contract be entered into without his assent, it is to his prejudice, and discharges him.

The cases proceed upon the distinction here pointed out, and conclusively settle the present action. In *Natwyn v. St. Quintin*, 1 Bos. & Pul. 652, where the action was by indorsees against the drawer of a bill, it appeared, that, after the bill had become due, and been protested for non-payment, though no notice had been given to the drawer, he having no effects in the hands of the acceptor, the plaintiffs received part of the money on account from the indorser; and to an application from the acceptor, stating, that it was probable he should be able to pay at a future period, they returned for answer, that they would not press him. The Court held it no discharge; and Lord Chief Justice *Eyre*, in delivering the opinion of the Court, said, that if this forbearance to sue the acceptor had taken place before noticing and protesting for non-payment, so that the bill had not been demanded when due, it

was clear the drawer would have been discharged, for it would be giving a new credit to the acceptor. But that, after protest for non-payment, and notice to the drawer, or an equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue the acceptor. He might forbear to sue him. The same doctrine was held in *Arundel Bank v. Goble*, reported in a note to Chitty on Bills. Chitty, 379, note *c.* ed. 1821. There the acceptor applied for time, and the holders assented to it, but said they should expect interest. It was contended, that this was a discharge of the drawer; but the Court held otherwise, because the agreement of the plaintiffs to wait was without consideration, and the acceptor might, notwithstanding the agreement, have been sued the next instant; and that the understanding that interest should be paid by the acceptor made no difference. So, in *Badnall v. Samuel*, 3 Price's Exch. 521, in a suit by the holder against a prior indorser of a bill of exchange, it was held, that a treaty for delay between the holder and acceptor, upon terms which were not finally accepted, did not discharge the defendant, although an actual delay had taken place during the negotiation, because there was no binding contract which precluded the plaintiffs from suing the acceptor at any time.

Upon authority, therefore, we are of opinion, that this writ of error cannot be sustained, and that the judgment below was right. Upon principle, we should entertain the same opinion, as we think the whole reasoning upon which the delay of the holder to enforce his rights against the drawer is held to discharge the indorser after notice, is founded upon the notion that the stipulation for delay suspends the present rights and remedies of the holder.

The judgment of the Court below is, therefore, affirmed with costs.

Payne v. Commercial Bank of Natchez, 6 Sm. & M. 24, is an important case upon this branch of the subject. The facts will appear in the opinion of the Court.

SHARKEY, C. J. The plaintiffs in error were sued as indorsers of a promissory note, and after verdict against them moved for a new trial, which motion was overruled. The defence set up was, that the holder of the note had discharged the indorsers by giving time to the maker.

The question depends mainly on the evidence introduced on the trial, which is to the effect following: The maker of the note testified that, about the 28th March, 1840, he executed a note to the plaintiffs below for \$31,593, payable three days after date, the consideration of which was sundry notes then held by

the bank, on which he was liable either as maker or indorser, his object being to concentrate all his indebtedness in one note. On being asked where the note given then was, he stated that it was in judgment in Louisiana, and that \$2200 had been paid on the judgment by a sale of bank-stock, and that the judgment was also a lien on certain promissory notes given by R. C. Ballard to the witness for property sold to Ballard, which notes were secured by mortgage. He also stated that these notes were liable to be sold under execution. A transcript of the judgment in Louisiana was also introduced.

To rebut this proof the plaintiff below introduced Thomas Henderson, the cashier of the bank, who explained the transaction with Lillard, the maker of the note, in the following manner: Lillard called on him and expressed a wish to take up all his liabilities to the bank, and proposed to confess judgment for the full amount due, and to bind thereby all of his property. On consultation with one or two of the directors, the witness agreed with Lillard that when such a judgment should be confessed so as to bind all his property, and evidence thereof produced to the bank, the paper of Lillard should be given up, — Lillard employing his own attorney, and paying all the expenses incident to the consummation of this arrangement. In order to effect the arrangement, Lillard called on the witness for a statement of the amount of his indebtedness, which was furnished. The agreement was entirely conditional, intended, and so understood, to depend upon the confession of a judgment which should bind all of Lillard's property in Louisiana; and on the further condition that this should be done at Lillard's expense, and the bank notified. After this understanding took place, and before any confession of judgment, Lillard sold all of his property in Louisiana, consisting of land and negroes, to R. C. Ballard, which was the property intended to have been bound by the judgment. Some time before this understanding took place, Lillard delivered to witness two hundred shares of stock of the Commercial Bank of Manchester, to be held for him as collateral security for all of his debts due to the bank. After the sale of the property to Ballard, the witness was informed that Lillard did confess judgment, and that an execution had issued, under which the bank-stock was sold by the sheriff of Concordia for \$2200, but the bank had never received any of the money. On the order of the sheriff of Concordia the bank-stock was delivered to Ballard. The witness never gave, nor did he agree to give, any time whatever to Lillard. The memorandum was given at his request to enable him to carry out his own arrangement. The witness had no authority, by resolution of the board of directors or otherwise, to make this arrangement, but was in the habit of making such arrangements on consultation with some of the directors. The deposit of the bank-stock as collateral security occurred after the maturity of all of Lillard's liabilities, and the bank never relinquished the right to sue on the notes at any time.

At the request of the counsel for the bank, the Court charged the jury that the agent or cashier had no authority to bind the bank by any contract that would release parties from their notes. 2. To release an indorser, the engagement must be upon a good consideration and binding, and one that will suspend the remedy. 3. That unless the judgment in Louisiana bound all of Lillard's property, and the contract was ratified by the plaintiffs, the law is for them.

The kind of contract with the principal which will discharge the surety, is well

defined and settled. The effect of giving time to the principal in a forthcoming bond was considered by this Court in the case of *Newell and Pierce v. Hamer*, 4 How. [Miss.] 684. It was decided that a mere voluntary engagement to indulge the principal debtor would not discharge the surety. There must be a positive and binding agreement, based upon some new and valuable consideration, which is sufficient to tie up the creditor, and prevent him from asserting any remedy during the time for which the indulgence has been given. The same rule was holden to apply to indorsers of promissory notes. *Wade v. Buckner, Stanton, & Co.*, 5 How. [Miss.] 641. In this last case a bill of exchange had been taken, payable at twelve months, and a receipt given expressing that the note was to be credited with the proceeds of the bill; and this was decided to be insufficient to discharge the indorser.

Was there any such contract in this case? The evidence seems to fall far short of establishing any contract whatever that was binding on the plaintiffs below for one moment, even assuming that Henderson was authorized to do all that he did do. Lillard states that he executed a note, but he does not state that he did so by request, or with the knowledge of the bank, or that it was ever delivered. His testimony is unsatisfactory. He omits to state any thing of the transaction which led to the making of the note. He merely says that he made such a note, and that it was then in judgment in Louisiana. Henderson states the transaction in such a manner as to make it intelligible. It was a mere unexecuted promise to contract, on the performance of certain conditions. There was nothing in it binding. Lillard had promised to do certain things, and Henderson promised if they were done in a particular manner, he would deliver up the notes of Lillard. Lillard defeated the proposed settlement by selling his property. There was no consideration for this agreement; nor was there in fact any agreement to give time. Lillard does not state that there was, and Henderson states positively that there was not. Try this by the true test. Was there any period of time at which the bank was not at liberty to sue? There was not. When the proposed arrangement was spoken of, nothing was said about his giving a new note, and if by so doing his indorsers were discharged, then every indorser may be discharged in the same way. Lillard seems to have been the only actor in the matter. Even the money raised by the execution was never received by the bank.

This subject is also discussed in *Bank of Utica v. Ives*, 17 Wend. 501. The facts will sufficiently appear in the opinion of the Court, delivered by

NELSON, C. J. The defence to the action in this case is, that the plaintiffs gave time to the principal debtor, Morris; the jury have found in favor of it upon the facts, under correct instructions from the Court. The only question, therefore, presented is, whether the evidence warranted the verdict. Mere indulgence *at the will* of the creditor extended to the debtor, in no way impairs the obligation of the surety; if it did it would be a most inconvenient and oppressive rule, as then suits must immediately follow the maturity of the paper. It is well settled there must be a valid common-law agreement to give time, founded of course upon a good consideration, to have this effect. Was such an agreement proved here?

Morris, the maker, called by the defendant, is the only witness; and if there was an agreement he was a party to it, and in a situation to place the fact beyond

controversy. His interest was balanced, and for aught that appears, he is a man of respectable character. The witness was called by the defendant because he held the affirmative, and must establish the agreement giving time with reasonable certainty in the first instance. I have looked through the case, and do not find that this witness undertakes to prove any such contract,—not even that it was his purpose to procure one in the several interviews with the cashier of the bank; and if he is not able to assert the fact, so far as he himself was concerned, it cannot be expected that he could prove one on the part of the bank. The utmost that he testifies to is, *that he solicited indulgence to arrange his affairs, and try to relieve his indorsers; and that he was given to understand this would be extended to him.* No time, terms, or conditions upon which it would be granted were mentioned, asked for, or agreed upon. It is not pretended by the witness that the indulgence was assented to in consideration of the giving of the judgment, or the turning out of the notes and obligations. These are the considerations urged, and the only ones that can be relied on. If it was thus understood and intended by the parties, the witness could not well have forgotten the facts; at all events they are not to be presumed when one of the parties is not willing to assert them under oath; it would be presuming against the recollection of a party to the transaction the most deeply interested in it at the time, and therefore the most likely to remember it. To infer a contract under such circumstances would be not only substituting conjecture for, but against evidence; as the inability of a witness to testify to the existence of a contract to which he is alleged to have been a party, is something more than mere negative testimony. As the charge, however, was correct, assuming the point to be put to the jury, and there is no exception to the instructions in this respect, the new trial should have been granted by the circuit judge on payment of costs. There was an exception to the application of the doctrine giving time to the case, for reasons given by the counsel; but none respecting the submission of the question of fact to the jury.

New trial granted on payment of costs.

See also *Twopenny v. Young*, 3 Barn. & C. 208; *Ripley v. Greenleaf*, 2 Vt. 129; *Oxford Bank v. Lewis*, 8 Pick. 458; *Michigan State Bank v. Leavenworth*, 28 Vt. 209.

TIERNAN'S EXECUTORS v. JAMES WOODRUFF.

(5 McLean, 350. Circuit Court of the United States for Michigan, June, 1852.)

Agreement for delay. Bankruptcy. — A bankrupt maker of a promissory note procured from his creditor two months' time, within which the right to sue on the note was suspended. The agreement was upon a valuable consideration. *Held*, no discharge to an indorser.

*Per Curiam.*¹ This is an action on several promissory notes, given by Theodore Romeyn to the plaintiff's testator, indorsed by the defendant. The plea sets up in defence that time was given by the plaintiff to Romeyn. To this plea the plaintiff replied, that at and before the alleged time was given, Romeyn was a discharged bankrupt; that the debt was provable against his estate. Averments were added covering all the exceptions in the statute, under which it is permitted to go behind the certificate. To this replication the defendant demurred. Joinder in demurrer, &c.

On the part of the defendant it is contended, that under the authorities the defendant is discharged. It appears from one of the pleas that he was an accommodation indorser, and this is not denied by the pleadings.

It appears that after the maturity of the note, the plaintiffs entered into a sealed agreement with Romeyn, the maker, without the knowledge or consent of the indorser, and for a good consideration; to wit, a proposal for settlement made by Romeyn, and also of five dollars paid to the plaintiffs, the receipt thereof was acknowledged, the plaintiffs would not, for the space of two months from the date, commence any proceeding in law or in equity or otherwise against the said Romeyn, upon all or either of the four promissory notes therein mentioned, nor sue him, upon the same or either of them, &c.

Great care seems to have been taken, in drawing this agreement, to cover the entire ground necessary for the discharge of the indorser. It was under seal, for the valuable consideration of five dollars paid, and suspending suit on each of the notes, &c. There is certainly no want of skill shown in drawing this agreement, and no objection can be made to it for want of form or substance. It would serve for a safe precedent in all such cases.

For the defendant it is argued that the bankruptcy of the prin-

¹ McLEAN and WILKINS, JJ.

cial cannot affect the question of law. That although the discharge takes away the legal remedy against the bankrupt, yet this exists only where he avails himself of his right. It is a mere personal privilege, which no one can set up but himself; and if not set up, judgment may be rendered against him. Also that the moral obligation on the debtor to pay still continues, and the cause of action still remains, so that it is not necessary to declare specially on a new promise to pay. That the legal effect of our bankrupt act is the same as the English act. The provisions of both acts are substantially the same, and the English decisions are applicable here. A new promise would be binding under the English act. *Chitty, Contracts*, 190, 191; 13 *Mees. & W.* 34, 769; 8 *Mass.* 128; 5 *Barb.* 369; 11 *id.* 17, 369; 28 *Me.* 550; 9 *B. Mon.* 45; *Cowp.* 448.

The theory of law is, that the surety cannot be prejudiced by such an agreement; he may be benefited, and yet if time be given to the principal the surety is discharged. The case don't turn upon the fact of inconvenience or injury, but giving time for a valuable consideration is presumed to prejudice the surety. Giving time for a day discharges the surety. 5 *Peters, Com.* 728; 3 *Wash.* 70, 76; *Paine*, 305; 7 *Hill*, 250.

On the other side it is urged, in the language of the Supreme Court of the United States, 6 *How.* 283: "The principle on which sureties are released is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties, by which they are supposed to be injured."

The contract for delay to effect the discharge of the indorser must affect the rights of the indorser, or prejudice him. *McLemore v. Powell*, 12 *Wheat.* 554.¹

In *King v. Baldwin*, 2 *Johns. Ch.* 559, Chancellor *Kent* says: "On paying the debt, he (the surety) is entitled to the creditor's place by substitution, and if the creditor, by agreement with the principal debtor, without the surety's consent, has disabled himself from suing when he would otherwise be entitled to sue, under the original contract, or has deprived the surety, on his paying the debt, from having immediate recourse to his principal, the contract is varied to his prejudice, and he is consequently discharged." *Bank of United States v. Hatch*, 6 *Peters*, 250; 1 *McLean*, 93.

Our bankrupt law is different from the bankrupt law of England.

The latter operates by way of personal exemption from debts provable. 2 Bl. Com. 473; 2 Maule & S. 23; 2 Com. Dig. 157; 1 Steph. N. P. 689; 1 Barn. & Adol. 54; Stat. 37 Eliz. 7; 4 & 5 Anne, 17; 6 Geo. 4, c. 16. But our bankrupt law extinguishes the debt of the bankrupt even against his indorser. In *Mace v. Wells*, 7 How. 275, the Supreme Court say: "The fourth section of the bankrupt law provides that a discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts," &c. And under the fifth section, "All creditors, whose debts are not due and payable until a future day, indorsers, &c., shall be permitted to come in and prove such debts or claims under this act," &c. And a person who neglects so to prove a liability, cannot afterward recover the amount from the bankrupt. So the Court held in the above case.

In the case before us, Romeyn, the bankrupt, procured from the plaintiffs a suspension of their right to sue for two months. This agreement, being founded on a valuable consideration, was a valid contract. The indorser within that period could not pay the debt, and sue Romeyn. This, in law, prejudiced the rights of the indorser. But Romeyn was a bankrupt; what remedy was there for the indorser against the bankrupt? There was no remedy but to present his demand against the estate of the bankrupt, before it was due, under the fifth section of the bankrupt law. He has no recourse, at any time, against the bankrupt, if the proceedings were regular under which he was discharged, as alleged in the pleading, and not contradicted. The time given to Romeyn, under these circumstances, by no possible means could have operated to the prejudice of the defendant. The settled rule of law, therefore, as to the effect of giving time to the principal debtor, does not and cannot apply in this case. After the extension complained of, as well as before it, the indorser could have proved the extent of his liability against the bankrupt's estate, and that was the only remedy which, under the circumstances, the law gave him.

The demurrer to the replication is overruled, and judgment for the plaintiff.

So though the agreement to give time be upon a valuable consideration, if it was made with a stranger, it will not have the effect to discharge the drawer or indorser. * *Frazer v. Jordan*, 8 El. & Bl. 303. In this case the opinion of the Court was pronounced by

COLERIDGE, J. This was an action by the indorsee against the drawer of a bill of exchange; and the defendant pleaded that the plaintiff, without the de-

fendant's consent, had entered into an agreement with Messrs. Kerin that they would give time to the acceptor, in consideration of Messrs. Kerin promising that they would see the bill paid.

The first question for our consideration on the special case stated for our decision, was whether the plea was proved. This was a question of fact; and we intimated our opinion during the argument, that that plea was proved by the facts stated.

The remaining question on which we took time to consider was, whether a binding agreement for a good consideration with a person who is no party to a bill of exchange, to give time to the acceptor without the consent of the drawer, discharges the drawer.

It was said, in support of the plea, that the plaintiff had placed himself in such a situation as that he could not sue the acceptor without rendering himself liable to an action for damages. And it was said that the case fell within the doctrine laid down by the Court of Exchequer in the case of *Moss v. Hall*, 5 Exch. 46, 50, where *Parke, B.*, says: "Whenever a party's hands are effectually tied up so that he cannot break such an engagement without being made liable for a breach of it, the surety is discharged; the rule being that there must be either a new security given to extend the time, or a binding agreement upon a sufficient consideration to suspend the remedy." It was said that the case of *Ford v. Beech*, 11 Q. B. 852 [E. C. L. R. vol. 63], had established that a contract of this nature with the acceptor to suspend proceeding does not constitute a defence to an action, but only gives a cross-action for breach of the agreement to give time, and therefore that the exoneration of the surety in such case does not depend on the action against the principal debtor being barred by the agreement; and that the real reason of the discharge is that the party has subjected himself to an action for suing in breach of the agreement; and that this extends to the case of a contract with a stranger as well as to one with the principal debtor, as the being liable to an action if he sues the debtor, will render the creditor less likely to sue the debtor in proper time.

There certainly were authorities from which it has been often supposed that the reason of the discharge of the surety, by an agreement with the principal debtor to give time to him, arose from the right of action against the acceptor being suspended or gone. The doctrine so well established, that a parol agreement on good consideration to give time to a bond debtor does not discharge the bond surety at law, because a parol contract cannot affect a contract under seal, seems founded on this notion; as does also the doctrine of its being necessary that there should be a consideration for the promise to make it binding in point of law, though such consideration would be requisite as well to found an action for damages on the promise, as to raise a defence to the action on the original cause of action. Since the case of *Ford v. Beech*, however, we must take it for granted that agreements of this nature operate only to give a cross-action, and do not prevent an action on the original cause of action.

However the doctrine arose, we must consider it quite settled that an agreement for good consideration with the principal debtor, so far ties up the hands of the creditor who has entered into such an agreement, as that the surety is discharged; and we quite agree with the doctrine of Lord *Wensleydale*, in *Moss v. Hall*, 5 Exch. 46, that this remains law, notwithstanding the argument which

appears to have been raised in that case, founded on *Ford v. Beech*. The surety has a right at any time to go to the creditor and say: "I suspect the principal debtor to be insolvent; I will pay you, and I wish you to sue him." See the observations of *Williams, J.*, in *Strong v. Foster*, 17 Com. B. 201, 219 [E. C. L. R. vol. 84]. If, by a binding agreement with the principal debtor, the creditor has agreed not to sue him for a limited time, it would be a breach of faith of which the principal debtor would have a right to complain, if an action were brought against him within the period. And this is held to discharge the surety, although it seems from *Ford v. Beech* that he could still do so at the risk of an action by the principal debtor, on the contract to suspend suing. It is, however, a very different question whether this doctrine is to be extended for the first time to a case of a contract with a stranger, of which the debtor is ignorant, to which he is not privy, and in which the damages to the stranger for breach of contract may be merely nominal. The doctrine contended for would go the length of establishing that, whenever the creditor has placed himself in a position in which it is against his interest to sue the debtor, he has discharged the surety.

We think that the doctrine ought not to be extended to the case of a contract with a stranger. The principal debtor having given no consideration for the promise, has no ground to complain of the breach of it, and cannot say that faith has been broken with him. There is no privity of contract with him; and we see nothing on which any right, either at law or in equity (see Lord *Abinger's* observations in *Lyon v. Holt*, 5 Mees. & W. 250, 253, 254), for him to insist on such a contract can be founded. The stranger may have some private reason of his own to wish for some indulgence to be shown; and if he has given a good consideration, may be entitled to damages, nominal, or large or small, according to any legal interest he may have; but surely he is the only person to take advantage of his contract.

No such doctrine as that there can be a discharge in such case arising from a contract with a stranger has ever yet been established. In all the text-books which were cited, the rule is laid down as to a binding contract *with the acceptor or principal debtor*. The case of *Moss v. Hall*, 5 Exch. 46, on which the principal reliance was placed by the defendant, was the case of a contract with the acceptor; and it was to such a case that the observations of Lord *Wensleydale* were addressed; and the only case in which it has been suggested that a contract with a stranger would be sufficient, is a strong authority against such a doctrine. That was the case of *Lyon v. Holt*, 5 Mees. & W. 250, which was an action by the indorsee of a bill of exchange, alleged in the declaration to have been drawn by *Hobson on Hynes*, and indorsed by the drawer to the defendant, and by him to Messrs. *Woosters*, and by them to the plaintiffs. The defendant pleaded that the indorsement by the defendant was not directly to *Woosters*, but was an indorsement by the defendant to *John Holt & Co.* (persons other than the defendant), and by *John Holt & Co.* to *Woosters*, and that there had been an agreement between the plaintiffs and *John Holt & Co.* to give time to all the parties on the bills in question amongst others, and a giving of time in consequence. At the trial, the agreement between the plaintiff and *John Holt & Co.* to give time to all the parties on the bill, and the giving the time, was proved; but it was not proved that *John Holt & Co.* were parties to the bill. A verdict having passed for the defendants, and a rule having been obtained to en-

ter a verdict for the plaintiffs, the question arose whether it was a material allegation that John Holt & Co., the persons with whom the agreement was made, were parties to the bill; and it was suggested that it was sufficient to show a contract to give time *to* the acceptor, and that there was nothing in the authorities to show that the contract must be *with* him. The Court, after taking time to consider, held that the plea was not proved, and ordered the verdict to be entered for the plaintiffs. This was a decision that the allegation that the person with whom the agreement to give time to prior parties on the bill is made is a party to the bill, is a material part of the plea. If, as contended in the present case, a contract with a stranger was sufficient, the plea would have been proved by proof of the contract with Holt & Co., though they were strangers to the bills.

This is a distinct authority in favor of the plaintiffs; there is no case or doctrine the other way; and the text-writers all treat the agreement which is to discharge the surety as one made with the principal debtor.

We are not inclined to extend the rule for the first time to a contract with a stranger; but, for the reasons already stated we think that the plea is bad, and therefore that judgment should be entered for the defendant.

Judgment for the defendant.

See also, as to agreements for delay, *Bank of the United States v. Hatch*, 6 Peters, 250; *Lenox v. Prout*, 3 Wheat. 520; *Lee v. Levi*, 1 Car. & P. 553; *Priece v. Edmunds*, 10 Barn. & C. 578; *Kennard v. Knott*, 4 Man. & G. 474; *Bray v. Manson*, 8 Mees. & W. 668.

The last-named case holds that, where time was given to a prior indorser after judgment had been signed in an action upon the same bill of exchange against a subsequent indorser, the Court will not interfere to set aside the judgment on that ground, as the judgment could not be affected by such indulgence given after it was signed. See also *Baker v. Flower*, 5 Jur. 635.

COUCH v. WARING.

(9 Connecticut, 261. Supreme Court, June, 1832.)

Judgment and execution against maker. Indorser sued for balance. — The holder of a promissory note sued the maker thereof, and obtained judgment, which was satisfied on execution. He then brought an action against an indorser to recover a balance of interest due on the note, not included in the judgment and execution. *Held*, that the effect of the former proceedings was to discharge the maker from further liability, and to preclude the holder from resorting to the indorser.

THE case is sufficiently stated in the head-note.

BISSELL, J. It has been strongly insisted upon, in the argument of this case, that the judgment and execution offered in the

Court below, being *res inter alios actæ*, were admissible only to prove a payment *pro tanto*. To this it may be answered, that the records offered, are evidence of the facts therein contained; and of the legal consequences which result from those facts. If, therefore, the legal effects of the facts disclosed upon these records be to discharge Waterbury, the maker of the note, it is idle to contend, that the evidence is not available for this purpose, as well as to prove payment.

What, then, is the legal effect of the facts, appearing upon this record? This is the question now presented for decision.

Some principles, regarding bills of exchange and promissory notes, and having a bearing on this case, are too well settled to admit of dispute or doubt.

There is, for instance, no principle better established, than that a judgment against the maker, discharges none of the subsequent parties to a promissory note. Nor does a mere technical satisfaction constitute, for them, any defence; as where the acceptor of a bill of exchange was charged in execution, and discharged under the lords' act. And where the maker of a promissory note, being taken in execution, was discharged under an insolvent debtor's act, it was holden, that the subsequent parties still remained liable. *Chitty. Bills*, 161, 362; *Macdonald v. Bovington*, 4 T. R. 825; *Nadin v. Battie & al.*, 5 East, 147.

So also, if the maker become a bankrupt, and the holder prove his debt under the commission, and receive a dividend, this will not prevent him from resorting to the subsequent parties to the note. Nor will he be thus precluded, although he receive part-payment from the maker, or levy a part under a *fi. fa.* against him; for this is for the benefit of all parties. *Gould v. Robson & al.*, 8 East, 576, 580; *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652; *Ex parte Wilson*, 11 Ves. 411; *Kenworthy v. Hopkins*, 1 Johns. Cas. 107.

On the other hand it is equally well settled, that if the holder give time to the maker, or take from him any new security payable at a future day, without the assent of the other parties to the note, they are thereby discharged from their liability.

So also, if the holder enter into a composition with the maker, or discharge him, or do any act, the effect of which is to discharge him, (as by letting him out of custody upon a *ca. sa.*) the subsequent parties to the note are also discharged. *Claxton v.*

Swift, 3 Mod. 87 ; English v. Darley, 2 Bos. & Pul. 61 ; s. c., 3 Esp. 49 ; Clark & al. v. Devlin, 3 Bos. & Pul. 363 ; Gould v. Robson, 8 East, 576, 580 ; James v. Badger, 1 Johns. Cas. 131.

The principles involved in these decisions, are obviously these : —

1. That the holder of a promissory note is entitled to actual payment of it. This right the mere act of the law never takes from him, and so long as he remains passive, or does not act to impair this right, he may enforce such payment from any or all the parties liable. But

2. As the maker of a note is previously liable ; and the indorsers are in the nature of sureties, for the performance of his act, and have a right to look to him for indemnity ; if the holder do any act, the effect of which is to suspend, or to impair, or to destroy that right, he cannot afterwards resort to them.

Within which of these principles does the case before us fall ? It seems to me to fall clearly within the latter ; and that the maker of this note is for ever discharged, by the acts of the plaintiff. He had the entire dominion of the note, upon which he caused the action to be brought. He stated his own demand, prayed out execution, and procured that execution to be satisfied out of the goods and estate of the maker. In this the plaintiff has acted voluntarily. No part of the proceedings were, as to him, *in invitum*. He was not bound to take judgment for a less sum than was due on the note ; nor was he obliged to enforce that judgment even after it was obtained. He might then have resorted to the indorser. He did not choose to do so ; but proceeded to compel the actual payment of his judgment against the maker.

What is the effect of these acts of the plaintiff ? Is it not to discharge the maker of the note from *all liability* ? That the plaintiff cannot again resort to him, is clear beyond all doubt. This would be to defy all principle and all analogy.

The debt *as to him*, is extinguished ; and *as against him*, the maker has the highest discharge known to the law. He can have no relief even by petition for a new trial. Can he, then, by proceeding against the indorser, authorize *him* to resort to the maker ? Or, in other words, may he do that indirectly, which he has precluded himself from doing directly ? It has been gravely contended that he may. It is said, this action is sustainable, because

the defendant may have his remedy over, against the maker of the note.

If the premises were true, the conclusion would, undoubtedly, follow. But they are denied; and if found to be false, it is admitted that the conclusion must fail. Now I very well know that there are cases, in which the holder of a note is precluded from resorting to the maker, and yet may proceed against the subsequent parties; and they, having paid the note, may resort to the maker for their indemnity. As where he is discharged under the lords' act, or under the insolvent debtor's act, or has become bankrupt, and obtained his certificate. But in all these cases, an act of the law has intervened, and prevented the holder from resorting to the drawer of the note, on the ground, that as between them, there is a technical satisfaction.

But these cases do not go one step towards establishing the principle here contended for. Here the holder has, *by his own voluntary acts*, precluded himself from resorting to the maker. And is there a case to be found, where this has been done, and the subsequent parties to the note have still been held liable? Can a debt be extinguished, by the act of its owner, and yet the surety for that debt remain unanswerable? Upon what principle is it, that where time is given to the maker, the subsequent parties to the note are discharged? Clearly, upon this principle; that if payment might be enforced against a subsequent party he would have an immediate right of action against the maker; and the law will not endure, that the holder may do that indirectly, which he has precluded himself from doing directly. It would be a breach of faith.

But here the holder has done an act which prevents him from resorting to the maker *in all time*. He has discharged him. Can he, then, without a violation of all principle, authorize a subsequent party to the note, to do that which *he* can never do? and which he is prevented from doing, not by an act of the law, but by a course of proceedings entirely voluntary on his part?

But it has been urged, that the undertaking of the indorser is, that the maker shall pay the entire sum due on the note; and as only a part has been paid, the indorser is liable.

If the preceding observations are correct, they furnish a decisive answer to this claim.

But why was not the whole sum due on the note paid? The

only reason assigned is, that the holder saw fit to take judgment for a less sum. And having enforced payment of the judgment, he now resorts to the indorser to recover the balance. And this, it is contended, he has a legal right to do ; that is, the holder of a promissory note may so sever and divide an entire contract, as to sue for and recover distinct portions of it, of each of the parties liable. If, for instance, he hold a note of \$3000 with two indorsements, he may sue for and recover \$1000 of the maker, and \$1000 of each of the indorsers ; and they, in their turn, may have their remedies over against the maker for the sums recovered of them respectively ; so that after having satisfied one judgment, the maker is still liable to two further judgments on one and the same undertaking. In what book of authority or upon what principle is this doctrine sanctioned ?

It has, indeed, been urged, that this is nothing more than what obtains, almost daily, in practice.

It is said, that the holder of a note may proceed against all the parties to it, may recover judgment against all, and may obtain a partial satisfaction of one party and the residue of another. All this is true. But he can obtain but one satisfaction and his costs. And I have yet to learn, that where a party has rightfully paid a judgment recovered against him, he may be a second time subjected upon the contract, which was the foundation of that judgment.

In *Windham v. Wither*, 1 Stra. 516, the plaintiff brought two actions on a promissory note ; one against the maker and another against the indorser, and recovered in both. And the principal *in one judgment* and the costs in both having been tendered, it was moved, that no execution might be taken out, which was ordered accordingly ; and the Court said, they would have laid the plaintiff by the heels if he had taken out execution upon both.

I am of opinion that this action cannot be sustained ; and that the rule to show cause must be discharged.

The other judges were of the same opinion.

New trial not to be granted.

See the preceding cases and notes.

NEWCOMB *v.* RAYNOR AND OTHERS.

(21 Wendell, 108. Supreme Court of New York, May, 1839.)

Release of first indorser. — If the holder of a promissory note release the first indorser, this discharges the subsequent indorsers.

ASSUMPSIT against the maker and second and third indorsers of a promissory. Plea by the indorsers that the holder had given a release under seal to the first indorser. Demurrer to the plea.

NELSON, C. J. I am of opinion the plea constitutes a good bar to the action. As between the *first* and *subsequent* indorsers, the former must be regarded in the light of *principal*; he stands behind them upon the paper, and is bound to take it up, in case of default of the maker. A discharge of him, therefore, by the holder (regarding the relative position of the parties), on general principles, operates to release them.

It is said their rights are not prejudiced, as they may still resort to an action against him if subjected to the payment of the note, as the release leaves the implied contract existing between the *first* and *subsequent* indorsers unimpaired. Conceding this to be so, to permit a recovery against the defendants would but lead to an unnecessary circuitry of action. The plea shows a discharge for a presumed good consideration (as it is under seal) of the first indorser, and it cannot be doubted as the case stands, that if the defendants should be obliged to call upon him, the plaintiff would be bound to take his place. The case, therefore, comes within the familiar rule, that a release of the principal operates to discharge the surety.

It is further said that Goings may not have been legally charged as an indorser. If this were so, the plaintiff should have replied the fact, as we will not presume it in the face of the acts of both him and the plaintiff to the contrary. The release would not have been necessary on such a supposition.

Judgment for defendants on demurrer; leave to amend on usual terms.

PANNELL v. M'MECHEN.

(4 Harris & Johnson, 474. Court of Appeals of Maryland, June, 1819.)

Composition deed. Remedy against indorser reserved. — A made a negotiable note payable to B, who indorsed it to C, by whom it was indorsed to D. A and B made a composition deed with their creditors, and conveyed all their estate to trustees, among whom was C, and were discharged, with the proviso "that the said release shall not operate in favor of or be construed to release any persons or person who may be bound, &c., for A and B, or either of them, or who may have indorsed any note or notes drawn or indorsed by the said A and B, or either of them." *Held*, that C, who had received due notice of dishonor, was liable to D.

APPEAL from Baltimore County Court. Assumpsit on a promissory note by the indorsee (the appellant), against the last indorser (the appellee). The declaration contained two counts, one on the note, and one for money lent and advanced. The facts as agreed upon were these: The action is brought upon a promissory note drawn on the twenty-seventh of April, 1813, by John E. Dorsey, for \$3000, payable ninety days after date to Walter Dorsey, or order, by him indorsed to the defendant, or order, and by the defendant indorsed to the plaintiff, or order. Across the face of the note was written in red ink, "This note, held by Edward Pannell, at the time of signing the deed of trust from Wm. H. Dorsey and others to Henry Payson and others, forms part of the lien of \$64,500 to W. M'Mechen, mentioned in said deed. John E. Dorsey."

All the signatures to the note were admitted. Due and legal notice of its non-payment by the drawer was given to the several indorsers; and the plaintiff was the holder of the note at the time it became due. The above-mentioned writing in red ink was made and signed by John E. Dorsey, and was so made and signed by him in pursuance and in execution of a power vested in him by the deed hereinafter mentioned. A deed of trust was executed by William H. Dorsey and others to Henry Payson and others, on the twenty-third of June, 1813, a copy of which was annexed, and admitted to be a true and correct copy, and that the signature and seal of Edward Pannell, the plaintiff, to the said deed, was his signature, and that he had duly executed the deed within the fifty days prescribed therein. No part of the sum specified in the note, and for the recovery of which this action was

brought, had been paid or satisfied to the plaintiff. The question on this statement of facts was, whether or not the plaintiff was entitled to recover? The deed referred to was dated the twenty-third of June, 1813, and was between William H. Dorsey, John E. Dorsey, and Walter Dorsey, of the first part, Robert Gilmor, &c., of the second part, Henry Payson, William M'Meehen, &c., of the third part, "and the creditors of the said William H. Dorsey, John E. Dorsey, and Walter Dorsey, who shall sign and seal these presents within fifty days next ensuing the day of the date hereof, and also such other creditors of the said William H. Dorsey as are hereinafter specially provided for (without their signing and sealing these presents), of the fourth or other part." The deed then states that sundry tracts of land, &c., thereafter mentioned, had been mortgaged to Robert Gilmor, &c.; that William H. Dorsey, &c., were indebted to sundry persons in divers sums of money, which they were incapable of discharging otherwise than in the manner thereafter mentioned; that "in order to discharge the said several debts, they have proposed and agreed to convey, &c., unto the parties of the third part, and the survivors, &c., for the benefit of the parties thereto of the second part, and of such of the said parties of the third part as are creditors, and of the rest of the creditors of the said William H. Dorsey, &c., in the manner and under and subject to the powers, provisos, and conditions hereinafter expressed and declared, all and singular the real and personal estate hereinafter described or mentioned." The said William H. Dorsey, &c., pursuant to the said agreement, and in consideration of the said sums of money so due and owing from them, and in consideration of the sum of one dollar, &c., granted, &c., to Henry Payson, &c., sundry tracts of land, &c.; to have and to hold the said lands, &c., unto the said Henry Payson, &c., and the survivors, &c., upon certain trusts, &c. That certain funds be applied, in the first place, to discharge the debt due to Robert Gilmor, &c. In the second place, one-half, &c., to be applied to the payment of \$19,000 due and owing by John E. Dorsey for borrowed money, and to extinguish the interest on \$64,400, and any indorsements or engagements which shall be admitted by John E. Dorsey within fifty days, over and above that sum, being the admitted lien of the said William M'Meehen on the estate and property, &c. After stating sundry other things it proceeds as follows: "And such of the parties hereto of the third part, as are

creditors, and all the parties hereto of the fourth part whose names are hereunto subscribed and seals affixed, do hereby respectively signify and declare their assent to the terms and conditions of this deed, and their approbation of the provisions hereby made for the satisfaction and discharge of their several and respective debts and claims, and in consideration thereof they do severally and respectively release, acquit, and by these presents for ever discharge, the said William H. Dorsey, John E. Dorsey, and Walter Dorsey, their heirs, &c., and each and every of them, and from the payment of the debts and sums of money due or owing to them, the said creditors, from or by the said William H. Dorsey, John E. Dorsey, and Walter Dorsey, jointly, or from or by any or either of them jointly or individually; and also from all other claims and demands whatever, from the beginning of the world to the date of these presents. Provided that the said release shall not operate in favor of, or be construed to release any persons or person who may be bound for the said William H. Dorsey, John E. Dorsey, and Walter Dorsey, or any or either of them, or who may have indorsed any notes or note drawn or indorsed by the said William H. Dorsey, John E. Dorsey, and Walter Dorsey, or any or either of them." This deed was signed, sealed, and acknowledged by the Dorseys and Gilmor, and by all the parties named therein, and among others by the plaintiff. On these facts the County Court gave judgment for the defendant, and the plaintiff appealed to this Court.

JOHNSON, J. The present is an appeal from a judgment obtained by the appellee on a suit brought against him by the appellant, decided on a case stated. [After stating the facts he proceeded.]

On those facts the plaintiff ought and would have recovered a judgment. The defence relied on is that the plaintiff, the indorsee, and holder of the note, released the drawer and the first indorser, and thereby discharged the last indorser.

In forming an opinion in this cause, the nature of the release in question, and the manner and terms on which it was obtained, demand particular attention. The drawer and the first indorser, finding themselves in embarrassed circumstances, unable to meet their engagements as they became due, propose to compound with their creditors; and on the twenty-third of June, 1813, executed a deed of trust to certain trustees, of whom the defendant was

one, of a large real and personal estate, to be by them applied towards the payment of their debts, in the order directed by the deed; thereby securing, or attempting to secure, to the defendant in this cause, the payment of the notes in question, on the terms that such of their creditors as should come in and assent, by becoming parties to the deed, should participate and have an interest in the property so conveyed. The deed itself contains a clause by which the drawer and the first indorser are released, on the express terms that such release should not extend to any other person, but that such person should continue responsible as if the deed had not been executed. To those terms the plaintiff and defendant assented, and signed their names, and set their seals to the instrument.

It is on that release, so obtained, and on such express stipulations, that the defendant, against the express terms of the instrument itself, relies for his exoneration.

The first question which arises is, ought a release on principle so obtained, with the consent of all parties interested, specifying its extent and object, to be extended beyond the stipulated object?

The second is, will the law, against the express agreement of all the parties interested, enlarge the release so as to produce a result different from the express stipulations; in other words, to give to the last indorser the benefit of the release against his express agreement?

The object of the deed of trust was to give to the creditors of the drawer and first indorser all the benefit they could derive from the property so conveyed, as between them this arrangement was of considerable moment; without it the second indorser would have had nothing to rely on but the individual responsibility of the drawer and first indorser; that individual responsibility he was willing to release, on the substitution of the property conveyed on the terms and on the conditions prescribed by the deed.

It may be asked, why must a release, to which all persons interested are parties, have an effect different from that they agreed on? Will it violate any well-known rule of law, or is it inconsistent with any principle of justice or propriety? So far from the latter being the case, the reverse appears to follow; for as the original debtors were bound to pay the whole, and as they could not, but were willing to transfer, on terms acceptable to all inter-

ested, what they had, for the easement of those who were bound for them, the refusal of him then holding the obligation to accede to such terms, would present grounds of complaint; not such, it is true, as would exonerate those who were bound for them. But although it would not free them, yet it is evident such refusal, in its result, must draw more from the funds of the last indorser than otherwise would have been the case. With the assent of the holder of the note, a part, if not the whole, might have been raised from the funds of the drawer and first indorser. Those funds could not be obtained except on their discharge; that discharge the second indorser was willing to assent to, remaining himself responsible. But, if such discharges cannot be obtained without releasing the last indorser also, then no accommodation for his benefit, requiring the assent of the holder, can ever be obtained.

The question then is, must the release of the drawer and first indorser, by virtue of any fixed principle of law, release also the next indorser, when he is a party to the instrument containing the release, expressly declaring such should not be the effect?

In a case of this description, when a person claims the benefit of a release against its terms, to which he has assented, it might be expected some decisions in support of the position would have been produced; none such have been cited.

The cases relied on are, that a release given to a joint obligor, or to joint and several obligors, will release the other, and that a release to one trespasser, will release the co-trespasser.

As to the case of the joint obligor released, discharging the other, the principle of the decision seems to be, that unless it extended to all, the person to whom the release was given could obtain no benefit by it; and therefore, that a release given to such an obligor, should extend to the co-obligor, although the release on its facts contained a proviso to the contrary.

The only case which has been produced of such a limited or restricted release is *Everard v. Herne*, in *Littleton*, 190; but the counsel differ in opinion as to the real state of that case. The one supposes the bond to have been joint only, the other joint and several. The reason why it is conjectured to have been joint and several is that the suit was brought against one. There is nothing in the case from which it is to be inferred the bond was several as well as joint, except only that one was sued. Nor is it deemed of any importance whether joint, or joint and several. But sup-

posing the case in Littleton to have been on a joint and several bond, yet it seems not to meet the case before the Court; for nothing is disclosed by that case of the assent of the co-obligor to such release producing such an effect. It is presumed that the release in that case was on a joint bond, for if the bond was joint and several, the obligor might have sued one, omitting to sue him he wished to benefit; a release therefore was not necessary, unless it was intended, as between the obligors themselves, to change the co-responsibility, and cast the whole burden on him whom the obligor elected to remain liable. But the case in Littleton is the only authority cited with a restrictive release.

All the other cases of releases are where the releases are general, importing satisfaction; and the debt, once satisfied, whether joint, or joint and several, the demand of the obligee was at an end, and of course he could recover from no person — differing materially from a release showing by itself the claim still existed, — differing materially from a case, where, by the facts as agreed on by the parties, it is expressly admitted that no part of the money has been paid or satisfied.

The cases most apposite to the cause before the Court are where the holder of a note, or bill, gives time, which would exonerate the drawer or indorser; but which fact of giving time is deprived of that effect in consequence of the assent of the person who would have been bound, if such time had not been given. The time given is the ground of discharge or exoneration, the assent deprives the time so given of such an operation.

Therefore, without saying that a release to a person bound jointly and severally, with a proviso attempting to limit its effect, can operate to the discharge of the co-obligors not included in the release, the Court are clearly of the opinion, that the release given in this case cannot discharge the defendant from his responsibility as indorser of the note on which the suit is brought. The judgment of the Court is therefore reversed.

Judgment reversed.

Sohier v. Loring, 6 Cush. 537, was a similar case, except that the indorser sued was not a party to the composition deed. The opinion of the Court was delivered by

METCALF, J. The composition made with the acceptors would have discharged the drawers and indorsers, if there had not been inserted in the composition deed a proviso that it should not prejudice the holders' remedies against any other parties besides the acceptors. Bayley, Bills (2d Am. ed.), 357, 358. The first question in the case therefore is, what is the legal effect of that proviso?

It is settled in England that a discharge or giving time by a creditor to his principal debtor will not discharge the surety, if there be an agreement between the creditor and the principal debtor that the surety shall not be discharged. And this rule of law is applicable to parties to bills of exchange and promissory notes, who are liable only on the failure of prior parties, though they are not technically sureties of those parties. 1 Steph. N. P. 936; Montagu, Composition, 36; Burge, Suretyship, 210; Chitty, Bills (10th Am. ed.), 420; Byles, Bills (2d Am. ed.), 202. See also *Mallet v. Thompson*, 5 Esp. 178. The same doctrine was advanced by Messrs. Hamilton and Riker in argument, and was recognized by the Supreme Court of New York in *Stewart v. Eden*, 2 Caines, 121, very soon after it had been laid down by Lord *Eldon*, in *Ex parte Gifford*, 6 Ves. 805. In this last case Lord *Eldon* said sureties would not be discharged by a discharge of the principal, if there was "a reserve of the remedy" against the surety, and that Lord *Thurlow* had so admitted in a previous case not reported. He afterwards laid down this principle more authoritatively in *Boulbee v. Stubbs*, 18 Ves. 20, and *Ex parte Carstairs*, 1 Buck, 560. In *Ex parte Glendinning*, 1 Buck, 517, he said: "If a man by deed agree to give his principal debtor time, and in the deed expressly stipulate for the reservation of all his remedies against other persons, they shall still remain liable, notwithstanding the arrangement between their principal and the creditor."

In *Nichols v. Norris*, 3 Barn. & Adol. 41, the Court of King's Bench decided that a composition like that in the present case, made with the indorser of a note given for his accommodation, did not discharge the maker. It was said by the Court that such composition deeds were very common; and that the special proviso took the case out of the common rule as to the discharge of sureties by giving time to the principal.

In 1846, the case of *Kearsley v. Cole*, 16 Mees. & W. 128, came before the Court of Exchequer. That was an action for money paid for the defendant, for whom the plaintiff had been surety. The defence was, that the defendant had made an assignment to his creditors, who had covenanted not to sue him. But it appeared that there was a proviso in the deed of assignment, that any creditor might execute it without prejudice to any specific lien or security, or to any claim against any surety, and that this proviso was inserted with the knowledge and consent of the plaintiff. He was afterwards called on as surety of the defendant, and paid the claim. The question was, whether this payment was to the use of the defendant, or was a voluntary payment which gave him no right to reimbursement. The Court held that the plaintiff was entitled to recover, — he not having been discharged from his suretyship by the deed of assignment. The opinion of the Court was given by Mr. Baron *Purke*, who fully and clearly stated the decisions and the principles upon which they were made as follows: "The question is, what is the effect of a discharge with reserve of remedies consented to by the surety? We do not mean to intimate any doubt as to the effect of a reserve of remedies without such consent; and the cases are numerous that it prevents the discharge of a surety, which would otherwise be the result of a composition with, or giving time to, a debtor by a binding instrument; and the reserve of remedies has that effect upon this principle: first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, second-

ly, that it prevents the rights of the surety against the debtor being impaired, — the injury to such rights being the other reason; for the debtor cannot complain if, the instant afterwards, the surety enforces those rights against him; and his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him. This is the effect of what Lord *Eldon* says in *Ex parte Gifford and Boulthée v. Stubbs*, as to the reserve of remedies; and the general proposition that, with that recourse, the composition or giving time does not discharge the surety, is supported by those and the following cases: *Ex parte Glendinning*; *Nichols v. Norris*; *Smith v. Winter*, 4 Mees. & W. 454, and others. This point must therefore be considered as settled. Some remarks have, indeed, been made by Lord *Denman*, in the case of *Nicholson v. Revill*, 4 Adol. & Ellis, 675, on the doctrine of Lord *Eldon*, in *Ex parte Gifford*, throwing doubt on its correctness, on the supposition that Lord *Eldon* had held that a creditor could *release* one joint and several debtor, and hold another liable by a reserve of remedies; which would certainly be against the decision in *Cheetham v. Ward*, 1 Bos. & Pul. 630, unless the instrument of release could, by reason of the context, be construed to be a covenant not to sue, as it was in the case of *Solly v. Forbes*, 2 Brod. & Bing. 38. But we consider it clear that Lord *Eldon* meant only to apply the doctrine to cases where there was *no release*, but a composition or giving time not amounting to a *release*, which is the present case; and, with reference to it, the rule laid down by Lord *Eldon* is not impeached by Lord *Denman's* remarks." And the decision of the Court was that the surety's consent to the creditors' reserve of their remedy against him did not alter the law of the case in favor of the principal.

These doctrines were incidentally recognized by Mr. Justice *Wilde*, in *American Bank v. Baker*, 4 Met. 175, and were adopted and applied by the Court of Appeals of Maryland, in *Clagett v. Salmon*, 5 Gill & J. 314.

It is very obvious that a principal debtor may gain little or nothing by such a composition as this with his creditor, inasmuch as he is left liable to the like proceedings against him by his sureties, which his creditor might have instituted if no composition had been made. But if he pleases to subject himself to that liability by voluntarily executing an agreement which has that effect, there is no legal reason why he should not be held to that agreement.

On these grounds we are of opinion that the holders of the bills in the present case were rightly permitted by the master to prove their claims thereon against the drawers and indorsers, — the latter not having been discharged by the composition made by the former with the acceptors.

See also *Hutchins v. Nichols*, 10 Cush. 299; *Gray v. Brown*, 22 Ala. 262; *Cowper v. Smith*, 4 Mees. & W. 519; *Bruen v. Marquand*, 17 Johns. 58.

Though the acceptor enter into a composition deed with his creditors, the drawer will not be discharged by a release of the acceptor from the holder, if he (the drawer) retain funds of the acceptor for the purpose of meeting the bill. *Sargent v. Appleton*, 6 Mass. 85.

An agreement entered into between the holder and the acceptor of a bill dishonored for non-payment, that the acceptor shall pay to the holder the amount of the bill and no more, discharges the drawer, though his assignees, he being then a bankrupt, are parties to such agreement. *De La Torre v. Barclay*, 1 Stark. 7.

WILLIAM E. MAYHEW v. WILLIAM BOYD.

(5 Maryland, 102. Court of Appeals, December, 1853.)

Mortgage security sold without indorser's assent. — An indorsement of three notes was made, in consideration of the execution of a mortgage at the same time by the maker to the holder, by the terms of which the mortgagee was to sell the property only on default of the maker to pay the notes at their maturity. When the first note was due it was dishonored, but by the assent of all parties a new one was substituted in its place. The mortgagee, after the original, but before the new note or any of the others matured, sold the property with the assent of the mortgagor, but not of the indorser, applied the proceeds to pay the first two notes, and sued the indorser upon the third. *Held*, that the right to sell, which accrued upon the dishonor of the first note, was taken from the mortgagee by the substitution of the new one in its place, and the sale before the maturity of the latter was a violation of the contract between the parties and discharged the indorser.

General rule. — Any dealings with the principal debtor by the creditor which amount to a departure from the contract by which an indorser is to be bound, and which, by possibility, might materially vary or enlarge the latter's liability without his assent, discharge the indorser.

APPEAL from Baltimore County Court.

Assumpsit by the appellant, as holder, against the appellee, as indorser, of a promissory note for \$900, drawn by one W. B. Pyfer, in favor of one Robert Close, dated October 25, 1848, and payable in one year after date. Plea non-assumpsit.

Exception. The making, indorsement, and protest of the note, and due notice thereof to the defendant were admitted. The defendant then offered in evidence a mortgage executed by Pyfer, the maker of the note, to Mayhew, the plaintiff, of certain household furniture in a hotel in Baltimore city. This mortgage bears the same date as the note, and recites Pyfer's indebtedness to Mayhew for \$2089.23, for which he had given three notes of the same date with the mortgage, one payable to Boyd and the other two to Close, and indorsed by Boyd and Close, one for \$900, at one year (being the one in suit), another for \$594.61, at six months, and the other for \$594.62, at four months. The condition was, that if Pyfer should pay to Mayhew the said sum of \$2089.23 "according to the tenor and effect of said notes," the mortgage should be void; otherwise, Mayhew might sell the mortgaged property, and apply the proceeds to the payment thereof and the balance to the mortgagor.

When the note for \$594.62, at four months, became due it was protested, and due notice given to the indorsers; and shortly afterwards another note for \$614.39, dated eighth of March, 1849, was made by Pyfer, payable at forty days, to Close, and indorsed by him and Boyd, by way of renewal of the protested note, including the principal, interest, and costs of protest of the original note, and the interest for the time the new note had to run, which was delivered by Close to Mayhew, who thereupon delivered to him the said original note. It was further in proof, that on the eighth of April, 1849, after the original, but before the new note or either of the others mentioned in the mortgage became due, by the consent of the mortgagor and the authority of the mortgagee, the mortgaged property was sold and the proceeds paid over to Mayhew, who applied them to the notes as they fell due. The fund was more than sufficient to pay the two first falling due, which were not demanded of Pyfer nor protested, nor any notice given to the indorsers of their payment or non-payment. The sale was fairly made; and it was proved that Pyfer's house was well furnished in the summer of 1849, and that he went to California in June, 1849, taking with him property or merchandise to the amount of \$400 or \$500, and died there in 1850. It was further proved, that Close and Boyd indorsed said notes at the request of Pyfer; and when they called on Mayhew and proposed to become indorsers on said notes mentioned in the mortgage, it was understood and agreed that Pyfer would execute said mortgage. Upon the whole evidence the plaintiff offered three prayers, in substance as follows:—

1. This prayer, after leaving to the jury to find the sale of the mortgaged property by the mutual consent of Pyfer and Mayhew, and payment over of the proceeds to the latter by the former on account of the indebtedness mentioned in the mortgage before the notes for \$614.39 and \$594.61 became due, asserts Mayhew's right to apply the same to pay said notes without any demand on Pyfer or giving any notice to the indorsers of their payment or non-payment; provided the first was a renewal of one of the original notes which was not otherwise paid, and that he was not bound to credit the note in suit with any more of said proceeds than may remain after paying those two.

2. This prayer leaves to the jury to find the making, indorsement, and protest of the note in suit, that Mayhew fairly applied the proceeds of sale to pay the notes secured by the mortgage, that

the sale was fair and with the consent of the mortgagor, and such application left only a balance of the last note due (the one sued on), and then asserts that Mayhew was under no legal obligation to protest the two former notes in order to hold Boyd liable on the one in suit.

3. This asserts that if the jury find that no actual loss or damage was sustained by Boyd from the sale of the mortgaged property and application of the proceeds as above stated, then the facts of the sale being made before the time limited for it in the mortgage and without the consent of Boyd, are not sufficient of themselves entirely to bar the plaintiff's right to recover in this action.

The defendant then asked an instruction, that if the jury find the making and indorsement by Close and Boyd of the notes as mentioned in the mortgage; that Pyfer executed said mortgage to secure their payment; that the note for \$594.62 was paid and settled by another for \$614.39, drawn by Pyfer and indorsed by Close and Boyd; that Mayhew, before said notes or either of them became due, sold the mortgaged property without the consent of Close and Boyd or either of them; that the notes for \$614.39 and \$594.61 were not protested for non-payment, and Close and Boyd did not receive, and Mayhew made no effort to give them, any notice of their non-payment; that Pyfer, at the time the two last-mentioned notes became due, was in such circumstances that Close and Boyd could or might have recovered their amount from him; that the proceeds of said sale amounted to more than the note sued on with interest and were received by Mayhew, then he is not entitled to recover.

The Court (*Frick*, C. J. and *Le Grand*, A. J.) rejected the plaintiff's prayers and granted that of the defendant. To this ruling the plaintiff excepted, and the verdict and judgment being against him appealed.

MASON, J. The record in this case shows that the indorsement by the defendant of Pyfer's notes to the plaintiff was based upon the security afforded by the mortgage, and therefore the mortgage may be regarded as the consideration of the agreement into which the surety entered when he consented to indorse the notes. The terms of the mortgage, therefore, must be strictly complied with by the plaintiff in order to bind the defendant as indorser. One of those terms is, there shall be no sale of the mortgaged property until

default of the principal debtor to pay the notes upon their maturity. We think this part of the contract between the several parties thereto has been departed from in the sale which has taken place, under the circumstances detailed in the evidence. This sale took place before the maturity and dishonor of the notes in question, and without the assent, and, for all we know, without the knowledge, of the indorsers. It is true the first of the original notes had fallen due and was dishonored, but it is equally true, by the assent of all parties, another note was substituted in the place of it, which thereby took from the plaintiff his right to sell under the mortgage for the non-payment of that note: the effect of the substitution of the one note for the other was to place the new note in the same relation to the mortgage that the first one had borne. Before these notes became due, as we have already shown, the sale took place.

But it may be said, that although this might have been a departure from the strict letter of the contract between the parties, yet it cannot be shown that the indorsers were prejudiced thereby or their liability enlarged. Whether this was or was not the result of the premature sale, does not vary the question. Any dealings with the principal debtor by the creditor which amounts to a departure from the contract by which a surety is to be bound, and which by possibility might materially vary or enlarge the latter's liabilities without his assent, operates as a discharge of the surety. In this case it is not improbable, much less impossible, that if the plaintiff had duly protested the first two notes as they fell due and were dishonored, the indorsers, or one of them, might have paid them off, and by immediately suing the debtor thereon, might have secured the debt and thereby reserved the whole of the mortgaged property in the hands of the plaintiff for the purpose of meeting the third and last note upon its maturity. The sale of the mortgaged goods, under the circumstances under which it took place, deprived the indorser of the opportunity of pursuing the course we have pointed out, and of the chances, at least, of relieving himself from liability altogether.

Believing that the sale of the property under the circumstances was a violation of the terms of the contract with the indorsers, by which their rights might have been prejudiced, they are thereby discharged.

Judgment affirmed.

FARMERS' AND MECHANICS' BANK v. HENRY RATHBONE.

(26 Vermont, 19. Supreme Court, ———, 1852.)

Distinction between bill for value and accommodation bill. — If a bill of exchange be drawn and accepted at a time when the drawer has an open account with the acceptor, for goods which he is in the course of sending to the acceptor for sale, and it appear to have been the understanding of the parties, at the time, that the bill was to be paid by the acceptor, and its amount be entered in the general account, it will be treated as a bill drawn for value, imposing upon the acceptor the primary obligation to pay it, and cannot be held an accommodation bill; and its legal character, in this respect, will not be affected by any alteration of the balance of the account, nor by the fact, afterwards ascertained, that the drawer was indebted to the acceptor at the time of the acceptance.

The release of the drawer, in such case, by the holder, will not discharge the acceptor, but will be treated as a relinquishment, merely, by the holder, of so much security which he had for the payment of the debt.

Accommodation paper. Release of drawer. — An indorsee, for value, of a bill of exchange, who became such before its maturity, and in ignorance that it was given for accommodation, has a right to treat all parties thereon as liable to him according to their relative positions on the bill, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and this right is unaffected by any subsequently acquired knowledge, that the bill was given for accommodation. In such case a release of the drawer, by the holder, has no effect on the ultimate liability of the acceptor. And in this respect the rule is the same in equity as at law.

ASSUMPSIT on two bills of exchange for \$600 each. The declaration contained two counts; the first count was as follows: —

“The defendant is attached to answer to the plaintiffs in a plea of the case for that one Caleb E. Barton heretofore, to wit, on the fifth day of October, A.D. 1844, at Charlotte, in said county of Chittenden, according to the custom and usage of merchants from time immemorial, used and approved of within this State, made his certain bill of exchange in writing, bearing date the day and year last aforesaid, and directed the said bill of exchange to the said defendant, at number thirty-five, Water Street, New York, and thereby, then and there requested the said defendant thirty days after the date thereof, to pay to the order of one Samuel H. Barnes, the sum of six hundred dollars, for value received, and then and there delivered said bill of exchange to the said Samuel H. Barnes, which said bill of exchange the said defendant afterwards, to wit, on the day and year last aforesaid, upon sight there-

of accepted according to the usage and custom of merchants. And the said Barnes to whose order the payment of the said sum of money in said bill of exchange specified was to be made, after the making of said bill of exchange, and before the payment of said sum of money, to wit, on the day and year aforesaid, at the place last aforesaid, according to the said custom and usage of merchants, indorsed said bill of exchange, and then and there ordered and appointed the said sum of money in the same specified to be paid to the said plaintiffs, and then and there delivered the said bill of exchange so indorsed as aforesaid to the said plaintiffs, and the said plaintiffs aver that afterwards and when said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on the seventh day of November, A.D. 1844, to wit, at number thirty-five, Water Street, in the city of New York, in the State of New York, one of the United States of America, that is to say, at Charlotte, aforesaid, the said bill of exchange was duly presented and shown for payment thereof to a clerk in the store of the acceptor, according to the said custom and usage of merchants, and payment of the said sum of money in said bill of exchange specified, was then and there duly required, but that neither the said defendant nor any person or persons on behalf of said defendant, did or would when the said bill of exchange was so presented and shown for payment thereof, as aforesaid, or at any time before or afterwards pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do, of all which said premises said defendant afterwards, to wit, on the day and year last aforesaid, had notice, by means whereof according to said usage of merchants, he, the said defendant, then and there became liable to pay to said plaintiffs said sum of money in said bill of exchange mentioned, when he should be thereunto afterwards requested; and being so liable, he, the said defendant, in consideration thereof afterwards, to wit, on the day and year last aforesaid, at the place aforesaid undertook and then and there faithfully promised the plaintiffs to pay them the said sum of money, in said bill of exchange specified, when he should be thereunto afterwards requested."

The second count was for another bill of exchange for a like sum, of which the following is a copy:—

“\$600.

CHARLOTTE, Vt., 25th Oct., 1844.

“Thirty days after date please pay to the order of Samuel H. Barnes, six hundred dollars value received and charge to account of

Yours, &c.

CALEB E. BARTON,

Charlotte, Vt.

“To Mr. Henry Rathbone, }
35 Water Street, New York.” }

And indorsed by the said Barnes, and accepted by the defendant.

The case was tried March term, 1852, — *Pierpoint*, J., presiding. Plea, the general issue and trial by the Court.

On the trial, the plaintiffs proved the drawing and indorsing of the bills declared upon, and their acceptance by defendants as averred, and that they were regularly discounted by them before their maturity; that the same were duly protested for non-payment, and due notice given to charge the drawer and indorser. It appeared that no payments had been made upon them other than what appear in statement, marked “B,” which was as follows:—

Draft due Nov. 7, 1844	\$600 00
Protest, &c.	1 75
Interest to July 10, 1846	70 52
Draft due Nov. 27, 1844	600 00
Expense	1 75
Interest to July 10, 1846	68 19
	<hr/>
	\$1342 21
July 10, 1846, Cash	612 00
	<hr/>
	\$730 21
Interest to March 17, 1848	86 28
	<hr/>
	\$816 49
March 17, 1848, Cash	500 00
	<hr/>
	\$316 49

It appeared from the depositions, of one Ferguson, and Curtis Rathbone, introduced by defendant, that prior, and up to the acceptance of the drafts, Barton, the drawer, being in Charlotte, in this State, had been in the habit of consigning cheese to the de-

fendant at New York, for sale on commission and of drawing on the defendant for the proceeds, and that the latter was in the habit of accepting the drafts. That the bills in suit were so drawn and accepted, the defendant believing, when the last-mentioned bills were accepted, he had enough of Barton's property to meet them; but that at their maturity Barton was indebted to defendant on account apart from the bills in suit, and the latter had no property or funds in his hands of the former wherewith to meet them.

That the bills in suit are those charged October 11th and 30th, 1844, in the defendant's account appended to the deposition of Ferguson, and were respectively accepted at those dates, and were charged over to Barton in the same manner in which the other acceptances were in the said account. The defendant also introduced in evidence the following instrument:—

“In consideration of five hundred dollars, to the Farmers' and Mechanics' Bank, paid by Caleb E. Barton, of Charlotte, the said bank hereby wholly release and discharge the said Barton from all liability or indebtedness to said bank, which said bank have or may claim to have for, or on account of, any and all notes, checks, drafts, or bills of exchange or acceptances to which Henry Rathbone is in any wise a party, either as maker, drawer, indorser, or acceptor, or payee, or drawee, and also from all liability on any paper which has been sued against said Barton, in favor of said bank or any other paper said bank may have against Barton, previous to the seventeenth of March instant, which said Rathbone was or is any wise a party to.

“In witness whereof we have hereunto affixed the seal of said Bank, at Burlington, this thirtieth day of March, A. D. 1848.

(Signed) “FARMERS' AND MECHANICS' BANK. [L. S.]

“By John Peck, Pres't ”

The defendant also proved, that plaintiff's cashier impressed their seal thereon, and subsequently delivered the instrument to Barton's attorney, and that the plaintiffs were then as much in the habit of sealing instruments by impressing their seal upon the paper, as by sealing in any other way.

That July 10, 1846, Barton paid plaintiffs the six hundred and twelve dollars entered in the above statement “B,” when they discharged a mortgage, which they held against him as drawer; and that he supposed he was thereby discharged from any further

liability on the bills; but that the plaintiffs understood that he was not. Afterwards plaintiffs sued Barton, as drawer, and after suit and on March 17, 1848, rather than stand trial he paid five hundred dollars on the bills, the same entered in statement "B," with the understanding that he was to be discharged as drawer; but there was no other agreement to discharge him than what appears in said instrument, which was executed in pursuance of such understanding, and in consequence of the last payment, which sum last paid is the same mentioned in said instrument.

That on making said payment, the suit against him was withdrawn. The signature to the instrument was admitted to be that of John Peck's, then president of plaintiffs. The defendant also introduced the affidavit of his attorney, Ashbel Peck, filed in the cause, on a motion for continuance, March 25, 1847, in which affidavit Mr. Peck testified that he "made arrangements with the defendant, to take the testimony of his book-keeper in New York (defendant's brother), to show that the drafts in suit are accommodation drafts, as between defendant and the drawer, Caleb E. Barton, and that defendant had overpaid said Barton, exclusive of the drafts in suit, and that defendant was to go to New York, and expected to go in a few days, and write me the time and place and person before whom he would take the testimony. I was then to give notice to plaintiffs, and have the testimony taken in in season for this term, &c." But there was no proof, that the plaintiffs, previous to the execution of the release to Barton, had notice of the contents of the affidavit, except so far as it was known to their prosecuting attorneys in this suit, to whom the same was actually known at the time of its filing.

It appeared that the plaintiffs discounted the bills to Barton, under his representations and in the belief that they were drawn on cheese consigned to the defendant, and supposed that the defendant had in his hands property or funds of Barton sufficient to meet them when they were discounted and accepted; and that plaintiffs never had any knowledge to the contrary, except so far as they were informed of the same by said affidavit and by the appearing at the taking of said depositions. It also appeared that there was no evidence tending to show that the defendant had any knowledge of, or consented to, the release of Barton previous to its execution.

The plaintiffs claimed judgment for the balance of said bills.

unpaid, upon these facts and the evidence referred to. The County Court rendered judgment for the defendant.

Exceptions by plaintiffs.

ISHAM, J. This action is brought on two bills of exchange, drawn by Caleb E. Barton on the defendant, Henry Rathbone, of the city of New York; both of which were duly accepted, and before maturity, were discounted, and transferred by indorsement to the plaintiffs. When the bills matured, they were dishonored, duly protested, and notice thereof given to the drawer.

On the trial of the case, at the circuit, the defendant insisted, that the bills were accommodation bills; and, upon the facts stated in the bill of exceptions, he now insists, that the bills are of that character, that the drawer is the person primarily liable, that the acceptor stands as his surety, and that the release of the drawer, by the plaintiffs, operates as a discharge of the defendant, as acceptor. It is admitted, that if these bills are not accommodation bills, but are really bills for value, the release will not affect the liability of the acceptor. It will discharge all persons intermediate between the holders and drawer, but not those prior on the bills, nor those on whom rests a primary or absolute liability to pay them. *English v. Derby*, 2 B. & P. 61; *Bailey, J., in Clarke v. Dalton*, 4 Moore & S. 226. *Chitty, Bills*, 451.

We are not satisfied that these bills are to be treated as accommodation papers. It is true the fact is found in the case, "that at the maturity of the bills, the drawer was indebted to the acceptor on account, apart from the bills in suit, and that the latter had no funds in his hands of the former, wherewith to meet them." But, in connection with this statement, it equally appears from the exceptions, that during the season of 1844, the drawer, at different times, consigned to the defendant as commission merchant, for sale on his account, a quantity of cheese, the gross proceeds of which amounted to \$7848.78; and from the statement in the account of sales, we perceive that a much larger amount than the sum of these bills was realized therefrom, after these acceptances were given. The account arising from the sale of this property, commenced in July, 1844, and closed in November of that year. There has been no statement of that account rendered, or balance ascertained by the parties. As between them, the whole account remains open and subject to their future liquidation. While this

account was accruing, these bills were drawn and accepted, obviously and with the understanding that they were to be paid by the defendant, and the amount so paid be entered into their general account.

During that period, they doubtless anticipated, that the balance would be sufficient to pay these bills, and have been respectively disappointed in the amount finally realized therefrom; so that there is now a balance due the acceptor, as stated in the account of sales. But as these bills, at first, were drawn upon property consigned to the acceptor, and he accepted them with the same means of knowledge which the drawer had, and thereby assumed the primary obligation to pay them, there is no propriety in treating the bills otherwise than as creating obligations of that character, after they have passed, in due course of business, into the hands of an indorsee. In so treating them, we are manifestly carrying into effect the mutual intention of the parties when the bills were drawn and accepted; for it is distinctly stated in the case that both the drawer and the drawee supposed and believed that there were funds sufficient in the hands of the drawee to pay them at maturity, and under that belief the drawer made such representations to the plaintiffs, at the time of their indorsement and discount.

The legal effect and character of bills of exchange, so drawn and accepted, is not changed, or affected, by any alteration of the balance of the account, nor even by the fact if it should be afterwards ascertained, that there was an indebtedness, at the time of the acceptance, from the drawer to the acceptor. This principle is fully illustrated by the case of *Bagnall v. Andrews*, 7 Bing. 217. Indeed, the facts in that case, and the principles there established, have such a direct application to this case, that we cannot consider these bills otherwise than as bills for value, without entirely disregarding the authority and principles of that decision. In that case when the bill was drawn, the drawer had an open account with the acceptor, for goods which he was in the course of sending to him for sale; neither of them at that time knew the state of the account; "and it afterwards turned out, that the drawer was, at the time of the acceptance, indebted to the acceptor, instead of the acceptor being indebted to the drawer." Before the bill became due, the drawer became bankrupt, and indorsed the bill to the plaintiff, who was ignorant that an act of bankruptcy had been

committed. The drawer being called as a witness, was objected to as being interested, on the ground that this was an accommodation bill, and that if the plaintiff recovered, he would be responsible to the defendant, not only for the amount of the bill, but for the costs of that suit. *Tindal*, C. J., after remarking that such consequences would follow, if this was an accommodation bill, and that the witness would be incompetent, observed, that "we think, upon the facts in the case, the bill was not an accommodation bill. At the time it was drawn, the drawer had an open account with the defendant for goods sent, and which he was then in the course of sending to him for sale. The drawer might, at that time, reasonably expect, that the acceptor would pay the bill out of funds that might be in his hands, when the bill arrived at maturity; for the evidence is express, that, at the time the bill was drawn, neither the drawer or acceptor knew the state of the account. A bill so drawn and accepted cannot be treated as an accommodation bill, nor, consequently, is there any implied obligation, on the part of the drawer, to indemnify the acceptor against the costs of any action which may be brought against him." 1 Phil. Evid. 61; 9 Serg. & Rawle, 237.

If that case is to be treated as sound in principle, it makes a final disposition of the case under consideration; for under that authority, these bills cannot be considered as accommodation bills, but must be treated as bills for value; the acceptor being the party primarily liable, and the drawer considered only as his surety, or guarantor. In such case it was properly remarked, that the release of the drawer was a relinquishment merely of so much security, which the plaintiffs had for the payment of the debt, and which in no event can affect the liability of the acceptor.

It is very evident, also, that the plaintiffs could have sustained no action against the drawer of these bills, unless they had been duly protested and notice given. This principle is founded on the consideration, that a primary liability for their payment rests only upon the acceptor; while that of the drawer is contingent and collateral, and arises upon the default of the acceptor. The necessity of protest and notice, in such cases, is not avoided by a fluctuating balance in their accounts, nor even by the fact, where there exists an open account, that there is an indebtedness from the drawer to the acceptor. *Orr v. Magennis*, 7 East, 359; *Blackhaw v. Doren*, 2 Camp. 503; *In re Brown*, 2 Story's C. C. 502, 521;

Story, Bills, § 311 ; 2 Smith's Lead. Cas. 29 ; Smith's Mere. Law, 315 ; 15 Peters, 393.

But if these bills are to be regarded strictly as accommodation bills, the same result, we think, must follow. In such case, it is insisted, that the drawer is the person primarily liable ; that the acceptor is to be treated as his surety, and that the holder of the bills is bound so to regard and deal with them, notwithstanding the terms of the bill, whenever he has notice, that the acceptance was for accommodation ; whether that notice was received at the time he took the bills, or at any subsequent period.

It is proper to observe, that this question does not now arise between the drawer and acceptor ; as between them the consideration may be inquired into and the true relation of the parties shown ; but the question is presented in a case between the acceptor and an indorsee for value, without notice, that the bill was for accommodation at the time he became the holder. When these bills were received by the plaintiffs, they were invested with those legal rights, and became subject only to those duties that arose from what appeared on the face of the bills. Their legal effect and the relative liability of the drawer and acceptor could not be changed or altered by any fact not then appearing.

These principles have a peculiar application to bills of exchange, as they are designed for commercial purposes ; and their application is required to impart to them that credit and currency which is necessary to insure the purposes for which they were intended. At the time the plaintiffs became indorsees they had the right, on the one hand, and were bound, on the other, both at law and in equity, to regard the acceptor as primarily liable, and the drawer as his surety ; they could have released, compounded with, or given time to the drawer, without in any way affecting their right to hold the ultimate liability of the acceptor. Story, Bills, § 429, 430 ; 15 Peters, 393 ; 1 Mees. & W. 374. Such being their right at the time they became the holders of the bills, there is no propriety or authority in saying, that that right can be subsequently changed, or affected, by a mere notice from the acceptor to the holder, that the drawer had neglected to provide funds for the payment of the bills ; or by any act of the drawer and acceptor, to which the plaintiffs were not a party, and to which they have never given their assent. Theob. on Pr. & Sur. 216.

The plaintiffs, as holders of these bills, were not subject to any

of the equities existing between the original parties, and without their assent those equities cannot be imposed upon them. The case of *Mallet v. Thompson*, 5 Esp. 178, was an action by an indorsee against the maker of an accommodation note for the payee. The holder received part-payment, under a composition, from the payee, and covenanted not to sue him, which is a virtual release, knowing when he received the bill, that it was given for accommodation. Lord *Ellenborough* ruled, that the maker was liable, notwithstanding the payment and release; for his liability on the face of the note was primary and principal, and that of the indorsers was collateral and secondary; and whatever may be their liabilities between themselves, such was their liability to the holder. It was also held that the release would have no effect between the maker and payee; for whatever the maker was compelled to pay he might call upon the payee to repay; the release in no way disturbed their relations. On the application of the same rule to this case, whatever the acceptor may be compelled to pay, he can call upon the drawer to repay, notwithstanding the release; for their relations are not disturbed by its execution. It is evident, also, in this case, from the release itself, that a discharge of the bill was not intended by the parties, but simply a release of the drawer, by the holders, from any farther claim which they had personally on him, leaving the holders to pursue their remedy against the acceptor, as the party primarily liable. Story, *Promissory Notes*, § 423.

In the case of *Laxton v. Peat*, 2 Camp. 185, and *Collott v. Haigh*, 3 Camp. 281, a different doctrine was applied to accommodation bills, where the holder, at the time he received the bills, knew that they were for the accommodation of the drawer. Lord *Ellenborough* remarked, "that as it was an accommodation bill, of which all parties had notice, the acceptor can only be considered as a surety for the drawer;" and the acceptor was discharged by time being given the drawer. If these cases can be sustained on principle, they have no application to this case; for it may be said with more propriety, that if one take a bill of exchange, knowing at the time that it was for accommodation, he thereby assents to receive and hold it subject to that equity of the parties; while no such suggestions can be made in this case, as these plaintiffs had no such notice, when the bills were received and discounted.

The doctrine of those two cases was, however, subsequently shaken by Justice *Gibbs*, in *Kerrison v. Cooke*, 3 Camp. 362, and was afterwards overruled in the Common Pleas, in the case of *Fentum v. Pocock*, 5 Taunt. 192, in which *Mansfield*, C. J., observed "that the case of *Laxton v. Peat* was the first, in which it was held, that the acceptor was not the first and last person compelled to pay the bill to the holder; and that they were compelled to differ, and hold, that it is impossible to consider the acceptor of an accommodation bill in the light of a surety for the drawer; and that if the holder had known, in the clearest manner, that at the time of giving the bill, it was for accommodation, it would make no manner of difference." With this view of the case, *Heath*, J., and *Chambre*, J., agreed. It will be at once perceived, that in this case, the acceptor was held as the principal and primary debtor on an accommodation bill, known to be such by the holder, when he received it; and that act of the holder, which would have discharged a surety, was held not to affect his liability. We are not called upon, in this case, to approve or disapprove of the doctrine of that case, to the extent to which it was carried; but it is a decided authority for saying, that an indorsee for value, of a bill of exchange, who became such before its maturity, and in ignorance that it was given for accommodation, has a right to treat all parties thereon as liable to him according to their relative positions on the bill, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and that this right is unaffected by any subsequently acquired knowledge, that the bill was given for accommodation. In such cases it is regarded as a mere truism to say, that a release of the drawer, by the holder, has no effect on the ultimate liability of the acceptor.

The case of *Fentum v. Pocock*, has been sustained and approved by the subsequent cases in England; *Price v. Edmonds*, 10 Barn. & C. 578, 584; *Nichols v. Norris*, 3 Barn. & Adol. 41; *Harrison v. Courtauld*, ib. 36; *Rolle v. Wyatt*, 5 Car. & P. 181; 1 *Moody & M.* 14; *Yallop v. Ebers*, 1 Barn. & Adol. 698, 703. It is to be observed, also, that the same view of the subject is entertained by the different elementary authors. *Chitty, Bills*, 344; *Smith's Merc. Law*, 332; 3 *Kent's Com.* 104; *Bayley, Bills*, 364; *Story, Promissory Notes*, §§ 418, 423.

This subject has arisen before many of the courts in this country, and the rule is generally sustained, "that the parties to a bill,

or note, are bound by the character which they assume upon the face of the bill; if by that they are liable as primary debtors, or as principal, then, as to the holders, they are bound as such; and his knowledge, at the time when he takes the bill, that they or either of them are accommodation parties, will not vary the case." *Montgomery Bank v. Walker*, 9 Serg. & Rawle, 229; s. c., 12 Serg. & Rawle, 382; *White v. Hopkins*, 3 Watts & Serg. 99; *Lewis v. Hanchman*, 2 Barr, 416; *Commercial Bank v. Cunningham*, 24 Pick. 270, 275; *Church v. Barlow*, 9 Pick. 547, 551; *In re Babcock*, 3 Story's C. C. 393; *Sanford v. Lambert*, 2 Blackf. 137; *Clopper, Adm'r v. Union Bank of Maryland*, 7 Har. & J. 92.

In the case of *Claremont Bank v. Wood*, 10 Vt. 582, where several, some of whom were sureties, signed a note, "each as principals," and promised to pay, it was held, that as to the holders, they were to be regarded as principals, and not as sureties; and yet the primary liability of the acceptor, and the secondary liability of the drawer, is as expressly set forth on these bills, as if it were written out in full over their respective signatures. In either case, to vary their respective liabilities, as they have assumed them on the face of the bills and note, would be to vary and control their intended operation, and, in effect, to enforce a contract, which the parties never made.

On this subject it is important to observe a material distinction between joint and several promissory notes, or obligations, and bills of exchange, or notes, on which the parties have assumed only successive liabilities. In the former case, as between the makers and the holders, who at the time received the note with notice of the circumstances, under which it was given, the strict relation of principal and surety may exist, and evidence of that fact is not considered as contradicting its specific provisions, but as consistent with its terms; and the right of contribution, arising out of that relation, exists between them. 2 Am. Lead. Cas. 289, 303, in notes. But the drawer, and acceptor, and indorsers, of a bill or note, have not assumed a joint and several liability; neither are they strictly sureties; but are liable to each other, in the order of their becoming parties; and when the action is on the bill, or instrument, creating such successive liabilities, by an indorsee for value, without notice that the bill was given for accommodation, such testimony is inadmissible for the purpose of converting their successive liabilities into a joint and several obligation, or placing

them in the relation of principal and surety. The testimony clearly contradicts the express provision of the bill, and materially changes its legal effect. Unquestionably those liabilities may be changed, as between the parties, by an express contract to that effect, which may be enforced between them. But this in no way affects the rights of a holder, who, at least, became such in ignorance of that arrangement. Under such circumstances, the holder has only to look to the bill itself and the genuineness of the signatures, to ascertain the nature and extent of the liability of the parties thereon; and they are liable to him in the successive order in which their names appear upon the face of the bill. *McDonald v. Magruder*, 3 Peters, 471; *Flint v. Day*, 9 Vt. 345; *Brown v. Mott*, 7 Johns. 361.

This doctrine is sustained in Story's Treatise on Promissory Notes, in which, § 418, he observes, that "the strong tendency of the more recent authorities, is to hold that, in all cases, the holder has a right to treat all the parties to a bill as liable to him exactly to the same extent and in the same manner, whether he knows, or not, the note to be an accommodation note; for, as to him, all the parties agree to hold themselves primarily, or secondarily, liable, as they stand on the note; and that they are not at liberty, as to him, to treat their liability as at all affected by any accommodation between themselves." And in § 483, he farther says: "Nor would it make any difference in the case, that the released party was, in point of fact, the party ultimately bound to pay the note, and that the other party was a mere accommodation maker, payee, or indorser, for his benefit; or at least, it would not make any difference, unless the fact of its being such accommodation note were, at the time of receiving the note, and not merely at the time of the release, known to the holder." Story, Bills, §§ 291, 368, 432, 434. Chancellor *Kent*, 3 Kent's Com. 104, also observes, that "the acceptor of a bill is the principal debtor, and the drawer the surety, and nothing will discharge the acceptor, but payment or a release. Accommodation paper is now governed by the same rules as other paper. This is the latest and the best doctrine, both in England and this country."

As these bills were received and discounted by the plaintiffs before their maturity, without notice that they were for accommodation, we are satisfied, from the authorities, that they had a right to treat the acceptor as the principal debtor, and the drawer as liable

only on his default. In such cases there is no difference between accommodation bills and bills for value; in either case, a release of the drawer from any farther liability to the holder will have no effect, as a discharge of the acceptor from his primary liability on the bill; and this right, so to treat the parties on the bill, remains unaffected by any notice subsequently given, that the bill was for accommodation.

It is insisted, however, that the release of the drawer will in equity discharge the acceptor, and that the principles which prevail in that Court, are now equally available at law. From an examination of the cases in chancery, we entertain a decided conviction that the same principles, on this subject, prevail in equity as at law. If any diversity of opinion exists in that Court on this question, it has arisen more from a misapprehension of the rule at law, and a desire to conform to the principles there established, than from any rules prevailing in equity, at variance with them. There is much propriety in this; for the principles regulating bills of exchange have their origin in mercantile usage, and have been adopted to meet the exigencies and wants of commercial transactions; it is therefore equally the policy of courts of equity, as of courts of law, to make the application of, and enforce those principles, in relation to these securities, which experience has found necessary, to preserve their negotiability and credit.

In the case of the *Bank of Ireland v. Beresford*, 6 Dow, 233, Lord *Eldon* expressed his opinion of the case of *Fentum v. Pocock*, and observed, that, "if it went on the principle, that inquiry is not to be made into the knowledge of the party, but that all shall be taken as appearing on the face of the bill, I think it a most wholesome doctrine." The case is important only, as showing the individual opinion of Lord *Eldon* on that question, and as showing that no different rule had then prevailed in chancery. In the case of *Glendinning, ex parte*, 1 Buck, 517, Lord *Eldon* refused to adopt the principle of the decision of *Fentum v. Pocock*, and recognized the general doctrine, as held in *Laxton v. Peat*. That was the case of an accommodation acceptance, and known to be such, by the holder, when he received the bill. We are, therefore, not called upon to approve or disapprove of the doctrine of that case, for in this case, the plaintiffs had no notice, when the bills were received and discounted, that they were for accommodation.

If the plaintiffs in this case had received the bills with knowledge that they were given for accommodation, we do not say but that the defence would be available; for when one takes a bill, even before maturity, with notice of a given fact, it is not unreasonable that he should be charged with the consequences that result therefrom, as if the bill had been received overdue. But that principle does not apply, when the bill is taken before maturity, without notice, and for value; for the bill is then held independent of all equities existing between the original parties; and Lord *Ellen*, in that case, nowhere intimates that the principle would have such an application. It is only to the case of an accommodation bill, and known to be such by the holder when he received the bill, that he made the application of that rule.

The case, however, which should and does exert a controlling influence in our decision of this case, is that of *Harrison v. Court-auld*, 3 Barn. & Adol. 36. That case, it will be perceived, was sent from chancery by the Master of the Rolls, for the opinion of the Court of King's Bench. This circumstance alone creates the inference, that in relation to bills of exchange, on which the parties have assumed successive liabilities, the principles of equity are the same as at law, and that, if the acceptor of these bills is not discharged at law he would not be in equity; for it would be an idle proceeding for chancery to send a case to a court of law to ascertain the principles prevailing there, unless those principles have equal application in chancery. In that case, as we have assumed in this, the bill was accepted for the accommodation of the drawer, and was indorsed for value before its maturity. In that case, as in this, the holder was ignorant, at the time he received the bill, that it was given for accommodation, but was afterwards informed of that fact, before the act was done, which the acceptor claimed operated as his discharge. It will at once be perceived, how very similar are the two cases, in every important particular. On the hearing of that case, the decisions at law and in equity were considered; and all the judges, C. J. *Tenterden*, and *Parks*, *Taunton*, and *Patterson*, JJ., certified to the Court of Chancery that the acceptor was liable on the bill, the same as on a bill for value.

Whether, therefore, we apply to this case the principles prevailing in equity, or at law, the result is the same. The plaintiffs having no notice at the time they received the bills, that they

were given for accommodation, had a right to treat the drawer as collaterally liable thereon, and the acceptor as the principal and primary debtor; and this right of the holder remains unaffected by any subsequent knowledge which he may have, that they were for the accommodation of the drawer. Under such circumstances, the release of the drawer in no way affects the liability of the defendant as acceptor. This view of the case renders it unnecessary to pass upon other questions which were urged in the argument of the case.

The result is, that the judgment of the County Court must be reversed, and the case remanded.

Bank of Montgomery Co. v. Walker, 9 Serg. & Rawle, 229, was a similar case, except that the holder knew that the note was accommodation paper. It was held that the maker was not discharged; the Court approving the language of Lord *Mansfield* in *Fentum v. Pocock*, 5 Taunt. 192, quoted in the principal case. To the same effect are *Murray v. Judah*, 6 Cow. 484; *Cloppers v. Union Bank*, 7 Harris & J. 92; *Cronise v. Kellogg*, 20 Ill. 11; *Lambert v. Sanford*, 2 Blackf. 137; *Hansbrough v. Gray*, 3 Grat. 356. In all of these cases the holder knew that the bill or note was accommodation paper; and yet the acceptor or maker was held liable. A different rule probably prevails in New Hampshire and Louisiana. See *Parks v. Ingram*, 2 Foster, 283; *Adle v. Metoyer*, 1 La. An. 254.

But notwithstanding that the weight of American authority seems in favor of the rigorous doctrine laid down by Lord *Mansfield* in *Fenton v. Pocock*, we still think that in sound reason due payment by or release of the party for whose accommodation a note or bill was made or accepted, should discharge the paper in the hands of one who has notice that it was given for accommodation. In addition to *Glendinning, ex parte*, 1 Buck, 517, per Lord *Eldon*, cited in the principal case, *Lazarus v. Cowie*, 3 Q. B. 459, per Lord *Denman*, in 1842, is an authority directly holding this view. See note to *Eastman v. Plumer*, *ante*, 345.

SURETYSHIP.

ROSSELL R. KEITH v. MAJOR L. GOODWIN.

(31 Vermont, 268. Supreme Court, November, 1858.)

When surety holden as principal, as to guarantors. — When a person signs a note as surety for the makers and intrusts it to them, for the purpose of obtaining the money upon it, and they subsequently obtain further guarantors, upon the credit of all the signers, under the belief that they are joint principals, and in order to procure the money upon the note, such surety will be holden as a principal to indemnify the guarantors, if they are compelled to pay the note.

Contribution. Stipulation for full indemnity. — One who signs a note as guarantor or surety, others having before signed the same as sureties, may stipulate for full indemnity of each and all the former signers, or make that the condition of his own undertaking; and in that case he will not be liable to contribute with the other sureties to the payment of the note. And the facts and circumstances attending the signing or the guaranty of payment of a note, may be sufficient to indicate as clearly as an express stipulation or condition, the terms of the undertaking.

THE case is stated in the opinion of the Court.

REDFIELD, C. J. The note in question was executed by the members of a partnership or joint-stock company, and by this defendant as surety for them, by their procurement. One of the principals then procured the plaintiff and others to guaranty the payment of the note. The fact that the defendant was surety did not appear upon the face of the note, nor was it known to the plaintiff at the time he made the guaranty. The note was made payable to the Vermont Bank, and was procured to be executed, and the guaranty to be made, for the purpose of raising money upon it at that bank, it would seem. John A. Page, the cashier of that bank, on his own account discounted the note while it was still current, and subsequently, but before it became due, sold and indorsed it, in the name of the bank, to one Hubbard, who, after it fell due, called upon the plaintiff for payment, and he paid it, taking Hubbard's indorsement upon the note.

The plaintiff now seeks to recover the whole amount of the note of the defendant, as a joint maker or principal in the note, and if not in that capacity, then as co-surety, to recover of him his proportion of the amount paid. The defendant had no knowledge that any one was expected to guaranty, or that any one did guaranty the payment of the note, or that the note was put in circulation, or if so, that it had not been paid, until called upon by the plaintiff to pay it.

1. It is objected that the note was never discounted in the manner contemplated at the time of its execution, and that therefore the defendant never became liable upon the note.

We think the fact that this note was discounted by the cashier of the bank where it was made payable, and by him indorsed as the cashier, in the name of the bank, must be regarded as a sufficient recognition or adoption of the note by the bank, to render it binding upon all the parties to the contract, within the decisions in this State. This very point is, in effect, decided in *Bank of Burlington v. Beach*, 1 Aik. 62. The doctrine of this case has been repeatedly recognized in this Court, and never questioned. The same rule prevails in the State of New York. *Bank of Chenango v. Hyde*, 4 Cow. 567; *Bank of Rutland v. Buck*, 5 Wend. 66. This last case is where the note was procured, and made payable to the Bank of Rutland, for the purpose of raising money to pay upon an execution. The bank refusing to make the discount, the note was received substantially in payment upon the execution, and by consent of the bank was sued in their name for the benefit of the officer. And precisely the same point was decided by this Court, not many years since, in the county of Orleans. We cannot think, therefore, that the present case can be regarded as carrying the rule beyond where it has already been carried. And there is nothing in the principle of these decisions which does not commend itself to our sense of justice and propriety.

We are aware that a different rule, to some extent, prevails in the States of Massachusetts, Maine, and Ohio, as the cases referred to in the argument show. But we think the rule adopted in this State, *Bank of Burlington v. Beach*, *supra*, and which has been so long acted upon here, far better calculated to subserve the ends of justice and fair dealing, than that which denies the recovery upon that ground.

When a note is executed for the purpose of raising money in the

market, although made payable to a particular bank or firm, it is well understood that this is generally regarded by business men as rather a formal than a substantial part of the note. If the note were made payable at a particular bank, to the order of the makers, it would be much the same thing. So, too, if made payable to bearer generally. The name of the person to whom the note is payable is mere form. It is understood that it is going into the market as money, and in exchange for money, to any party who will make the discount. If negotiated at the bank, it may pass into other hands the next hour. And there is no claim that this will have any tendency to release the sureties. We think there is no difficulty with the case upon this point.

11. In regard to the right of the plaintiff as against the defendant, upon the note, we think the law is settled beyond all question, that he is, at all events, to be treated as a co-surety with the defendant, if not also as a surety for the defendant as a joint maker and principal in the note, so far as he is concerned.

As to the objection founded upon the case of *Gardner v. Walsh*, 32 Eng. L. & Eq. 162, that the guaranty was such an alteration of the note, being done without the consent of the defendant, as will avoid the note, we cannot regard this as coming fairly within the principle of that case. That case is not parallel with the present. There the decision goes upon the ground that after a note becomes effectual as a contract by delivery, it is not competent for the holder, without the consent of the makers, to procure an additional signer; that this is a material alteration and avoids the contract, whether it operates favorably or unfavorably to the other signers. Whether the decision to this extent is sound or not (and we do not intend to question that case), we think the rule thus laid down could have no application to a case like the present. Here the note was signed by the defendant, as a joint principal, and intrusted to his associates, and if he had signed as surety upon the face of the note, and intrusted it to his principals, the rule would have been the same. He thereby gives those to whom he intrusts the note an implied authority to obtain either additional sureties, as joint makers, or guarantors, indefinitely, until the note is fairly launched in the market as a security, having two distinct parties. Before that it is merely inchoate, and it is clear that the procuring of additional signers, guarantors, or indorsers, comes fairly within the implication of authority given

the party to whom the defendant's signature is intrusted, and which at that time, so far as additional signers are concerned, is to be regarded as merely blank, or, in one sense, as an authority to use the credit of the party, either alone or with others, in the form in which he has signed. But the idea that no other indorsement or guaranty is to be procured, and that if the note will not go in that form it is not to be used unless all the parties consent to the introduction of other parties, is certainly contrary to the understanding of commercial men, which is the law of such cases, and the only just basis of the implied contract resulting from the facts.

It being now well settled by the case of *Deering v. The Earl of Winchelsea*, 2 Bos. & Pul. 270, that a surety, although signing another instrument guarantying the same debt, must be regarded as a co-surety with all the sureties to the original contract, there would seem to be no question of the right of the plaintiff to claim a remedy to that extent against the defendant, even if he had, at the time of making the guaranty, known the defendant to have been a mere surety. This point was decided by this Court in *Flint v. Day*, 9 Vt. 345. See also *Norton v. Coons*, 3 Denio, 130; *Barry v. Ransom*, 2 Kern. 462; *Tobias v. Rogers*, 3 id. 59; *Craythorne v. Swinburne*, 14 Ves. 160; *Dering v. Earl of Winchelsea*, 1 White & Tudor's Lead. Cas. in Eq. 85, and notes, English and American, where the subject is elaborately examined, and the cases fully presented and accurately digested.

III. But it seems to a majority of the Court that the plaintiff is equitably entitled to treat the defendant as he held himself out upon the contract; *i. e.*, as principal. There was nothing to intimate that the signers were any thing but joint principals. And the defendant having so signed the note and intrusted to the others, with authority to obtain additional signers, or guarantors, it was giving them authority to represent the defendant as a co-principal; and by presenting the note merely, and asking a guaranty of the plaintiff, a virtual representation was made that the defendant stood as joint principal. The case may well be supposed of the defendant being the only responsible signer, and the guaranty being made wholly upon his credit. If he could afterwards be allowed to falsify this representation, thus held out upon the face of the paper, it might certainly work great injustice to the guarantor.

But this is a question depending mainly upon authority, we are aware, and should be decided upon the settled principles deducible from the adjudged cases.

It is admitted by all the writers upon this subject, and in all the cases where the question has arisen, and by all the judges, without exception, who have had occasion to speak of the point incidentally, that any one who is not in fact a joint or sole principal in a contract, but who binds himself for its fulfilment as a surety merely, may so stipulate at the time of entering into the obligation, as not to be liable to contribution with the other sureties who have signed before him. And the form of doing this is not important. Nor is it important that this should appear upon the contract. And where one signs as surety, after other sureties have signed, and without privity with them, it is not important that they should be made aware of the terms upon which subsequent sureties become holden. If the subsequent sureties become bound for the performance of the very same thing as the former ones, and especially by the same contract, the right of contribution is created in favor of the former sureties, unless there is some stipulation to the contrary. It is upon this ground that the action for contribution was maintained in *Flint v. Day*, *supra*, against Mr. Day, who stood much in the relation of the plaintiff here, the note being paid by the prior sureties, and the suit brought to compel contribution of the last surety signing, but who signed on the back of the note in blank; and the Court held that he thereby became a joint maker, and liable to contribution with the other sureties. But even that case, upon its facts, is more doubtful than it was then regarded by the Court. The later cases do not fully support it.

But where there is any thing in the form of the contract or the nature of the transaction, to show that the subsequent sureties did not expect to be holden as co-sureties with the others, but to stand merely as sureties for all the former signers, they are entitled to full indemnity from each of the others, or all jointly. As if the surety sign expressly as surety for all the above signers, or when he signs, saying he is willing to be responsible for all of them. In such case he is not liable to contribution. 1 Story, Eq. Jur. § 498; Chitty, Contracts, 598; Lead. Cas. in Eq. 68, and notes; *Pendlebury v. Walker*, 4 Younge & C. 424; *Moore v. Isley*, 2 Dev. & B. Eq. 372.

This very point is expressly decided in *Craythorne v. Swinburne*, 14 Ves. 160.

The facts of this last case seem to us very analogous to those of the present case, so far as the liability of the plaintiff to share the burden of paying this note, with the defendant, is concerned. In that case, as well as in this, the undertaking of the last surety was without the knowledge, expectation, or privity of the former ones; it was done, too, in both cases, to induce the advance of money upon the first contract, and because it could not be obtained without such additional indemnity or guaranty. And in the case of *Craythorne v. Swinburne*, it was clearly held that there was no duty of contribution among the two classes of sureties. It is held that in the case of *Craythorne v. Swinburne* the indemnity was by a separate instrument, and here it is upon the same paper, but by a distinct contract, referring to the other for brevity, as written above. We cannot suppose it could have made any difference in the present case if the plaintiff had given his guaranty upon a separate piece of paper, writing the note or describing it, instead of referring to it as written above. In the case of *Craythorne v. Swinburne*, the question was determined upon the circumstances and oral evidence in the case as matter of fact, and made dependent upon the intention of the last surety. The same question might here very properly have been submitted to the jury, if there really is any conflict in the evidence, or if there should be hereafter, it might be proper to have the finding of the jury upon this point.

But so far as the testimony is developed in the bill of exceptions, it seems to be all in one direction.

1. The form of the plaintiff's guaranty shows that he merely undertook for the solvency of all the primary signers of the note.

2. The manner of executing the note, the purpose of obtaining the guaranty, as well as the form of it, all look in the same direction. And unless the defendant can satisfy the jury that at the time the plaintiff signed the guaranty, he really expected to stand merely as a general surety, we think he is bound to indemnify him, as much so as if he had signed at his request, and upon his express assurance that he would see him harmless. As matter of fact, or implication from facts, we cannot but regard the consideration that the plaintiff's contract was in the form of a guaranty, as of some significance. The word guaranty in strictness may not import more than a promise or undertaking. But in commercial

circles, and among business men generally, the term is understood in a more specific sense. A guarantor is not a maker or indorser, but one who is understood to assume more the obligation of an indorser than of a maker. Both the indorser and guarantor are understood to undertake for the maker, and as an aid to his undertaking. And originally the guaranty was understood to be operative only upon condition of the failure of the maker to perform the contract. And that is the present import of all guaranties which are conditional or dependent upon some prior act to be performed by some other party, as that the note or contract is collectible; *i. e.*, may be enforced by due process of law. And even absolute guaranties, like the present, are understood differently, and therefore entitled to a different construction, from an absolute promise to pay a note.

If that had been the purpose of the plaintiff, and those who signed with him in this case, they would have merely underwritten the other signers of this note. The very fact that they made a separate contract, and that in the form of a guaranty, shows very fully that they did not intend a mere joint undertaking with the makers. We think the only fair construction of the plaintiff's undertaking, as between himself and the makers of the note, is, that he bound himself to whomsoever should be the holder of the note that the signers were responsible, and would pay the amount at maturity. And although, as between himself and the holder, this bound him absolutely to the payment of the note, if not paid by the makers, without notice of the default on the part of the makers, that being a fact of which he was bound to take notice, yet, as between him and them, his undertaking was for them jointly, and not jointly with them.

Judgment reversed, and case remanded.

The questions in regard to the responsibility of sureties upon notes or bills, or, what is the same thing in other terms, the obligations of accommodation makers and acceptors, both among themselves and in regard to other parties, are of paramount interest to the profession. We will here, in a brief way, refer to some few of the more recent decisions upon these questions.

There has been, first and last, considerable controversy how far one who is induced to sign a note or bill by fraudulent representation, is legally bound by it; as where one or more of the former signatures upon the credit of which one subscribes or indorses the paper is in fact forged or obtained by duress or fraud, or for any other reason not binding upon the party. In the case of *Seely v. The People*, 2 Am. Law Reg. N. S. 344; S. C., 27 Ill. 173, the plaintiff in error signed a

bond as surety after others had executed it; but one of the names appearing upon the bond as surety was shown to have been forged. The Court held the fraud such as to avoid the instrument as to sureties signing under such mistake. And it has been often held that where one signs an instrument not negotiable, on condition that some other name or names shall be procured to it before the same is delivered, and this condition is not complied with, and the instrument delivered without it, the party cannot be holden. *Pawling v. The United States*, 4 Cranch, 219; *Fletcher v. Austin*, 11 Vt. 447. So if it be agreed that a composition deed shall not be delivered until all the creditors sign, that condition must be observed in order to render the instrument binding upon any one who signed under that assurance. *Johnson v. Baker*, 4 Barn. & Ald. 440. And in *Pidecock v. Bishop*, 3 Barn. & C. 605, it seems to be held that any departure from the contract of suretyship will exonerate the surety. *Awde v. Dixon*, 5 Eng. L. & Eq. 512; *Lloyd v. Howard*, 1 id. 227; *Pahner v. Richards*, ib. 529; *Leaf v. Gibbs*, 4 Car. & P. 466. And this seems to be the English rule upon the subject. The creditor must see to it that he obtains a valid obligation against all upon whom he relies for its performance. And he cannot excuse himself from responsibility for the fraud of the principal debtor on the ground that the surety signed upon his assurance, and must look to him exclusively for its performance, as has been held in some American cases. *York County Mut. Fire Ins. Co. v. Brooks*, 3 Am. Law Reg. n. s. 399; s. c., 51 Maine, 506, where it was held that a surety who signed a bond at the request of the principal, and upon the assurance that he would also procure two others named and known to him to be responsible also to sign it before he delivered it, but failed to do so, this being wholly unknown to the obligee who accepted the bond, is still responsible. There is undoubtedly great plausibility in the argument that, in such cases, where the surety intrusts the bond to the principal in perfect form and with nothing to indicate that other signatures are required to complete the contract, as will be the case where other names appear in the body of the instrument, that he thereby puts it in his power to impose upon the obligee, and should therefore be held responsible for his conduct in that direction. But where the paper is not negotiable, the obligee is bound to see that all parties execute the same understandingly, and free from fraud or force. And in the precise case stated above, in the English Court of Exchequer Chamber, *Swan v. The North British Australian Company*, 10 Jur. n. s. 102 (1864); s. c., 8 Jur. n. s. 940; s. r. 7 Jur. n. s. 400, it was held that the surety was not holden. We cannot but feel that the English rule is the more salutary one in compelling caution in those who accept paper, as well as in those who execute it. The opposite rule unquestionably has too much the appearance of attempting to drag in every one where it can possibly be done, and turning them over to some other remedy or redress to which they never expected to look for indemnity. The whole subject is reviewed with great learning and ability by Mr. Justice Ray, in *Deardorff v. Foresman*, 5 Am. Law Reg. n. s. 539, which is here adopted as the best review of the authorities we could give.

RAY, J. Action by the appellee upon a promissory note, against Deeds, Deardorff, and Lehman. Deeds suffered a default. The other defendants answered in two paragraphs. First, that at the date of the note in suit, Deeds, who was insolvent, applied to them to execute the note with him, as his sureties, to the plaintiff, which they refused to do; that he fraudulently represented to

them that if they would sign the note he could procure as co-sureties with them eleven other responsible men, who are named, and that he would not deliver the note to the plaintiff until such signatures were procured; that he failed to procure the names he had promised, but delivered the note to the plaintiff. The note was made payable to the order of the plaintiff. The second paragraph of the answer averred the same facts, and was sworn to. The Court below sustained a demurrer to both paragraphs. This is here assigned as error.

The appellants insist that the ruling in the case of *Pepper v. The State*, 22 Ind. 399, requires that the decision of the Court below in this case should be reversed. We will consider the case cited only so far as may be necessary to determine its effect upon the question now before us. That case holds that, in an action upon an official bond given to the State, the sureties may defend, either upon the ground that the names of persons appearing to be signed to such bond were forged, and that they executed the bond upon the faith that such signatures were genuine, or that they were induced to execute and deliver the bond to the principal obligor upon the condition, or upon the consideration, or upon the promise, that certain other persons would sign it. It is, however, expressly said by the judge who delivered the opinion, in overruling the petition for a rehearing, that "we do not say that the same rule that applies to bonds taken pursuant to a statute, would apply in private transactions." We are not disposed to extend the effect of that decision to instruments negotiable either by statute or by the law merchant, unless required to do so upon authority or principle. And as the case cited is put rather upon authority than principle, we will consider how far the decisions require us to extend the ruling. Indeed, the opinion given upon overruling the petition for a rehearing rests, except so far as it is based upon the construction of the statute, which construction we are not called upon to review, upon the case of *Bibb v. Reid et al.*, 3 Ala. 88, which, it is stated in the opinion, "is directly in point, and after much reflection we are prepared to say is, in our judgment, good law." That case cites the law as stated thus, in *Sheppard's Touchstone*, 59: "So it must be delivered to a stranger; for if I seal my deed and deliver it to the party himself as an escrow, upon certain conditions, &c., in this case, let the form of words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and (in reference to the legal operation of the deed), he is not bound to perform the condition."

The opinion proceeds: "The rule as above stated in the *Touchstone*, has been recognized in the United States in the cases cited from 5 Cranch, 351, 8 Mass. 230, and 2 Sumner, 487; but it does not appear to obtain at this day in England, as appears by the case of *Johnson et al. v. Baker*, 4 Barn. & Ald. 440, where a composition deed was delivered by a surety who had signed the deed to a creditor, not to be operative unless all the other creditors executed it. It was held that the deed was delivered as an escrow, and that all the creditors not having executed it, the surety was not bound. To the same effect are the cases cited from 3 Wend. 380; 11 Vt. 448; 4 Cranch, 219; 2 Harrington, 396; 11 Peters, 86." The Court seem evidently to have misconceived the effect of the decision in the case of *Johnson et al. v. Baker*. The creditors were all parties to the deed of composition, and when the debtor alone had executed it "the deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors." It does not very clearly appear that be-

cause an instrument, after being executed by one party may be delivered to another party to be executed by him, and presented by him to others who are parties to the deed for their execution, and still not become a deed till executed by all parties, that therefore a deed, perfect in form and execution, may be delivered by the grantor to the grantee as an escrow. Nor is the citation of the ruling in *Pawling et al. v. United States*, 4 Cranch, as conflicting with the later case of *Moss v. Riddle*, 5 Cranch, satisfactory, especially as the later case is in conflict with the doctrine asserted by the Alabama Court. But we will examine that case more carefully in the course of this opinion, only remarking in passing that, whatever the case in 4 Cranch does decide, which we will endeavor to determine in the subsequent review of the case, it certainly does not hold that a delivery may be made by the obligor of the bond to the obligee, as an escrow. Nor does the case of the *United States v. Leffler*, 11 Peters, examined hereafter, establish any such doctrine. The case in 3 Wend. 380, was where a bond had been executed by nine persons as obligors, "and sent to New York to be delivered to the plaintiff on certain terms and conditions, by which the obligors intended to be indemnified for having become bound for the payment of the money. The plaintiff's refused to receive the bond on the terms and conditions proposed. Subsequently, on the 29th October, 1824, five of the obligors, but not those sued in the action, without the knowledge or consent of the defendants in this action, having made a new and different arrangement with the plaintiffs by which the security relied on by the defendants for their indemnity was yielded up, delivered the bond to the plaintiffs." It was held that the bond was not obligatory upon the four who never entered into the new arrangement with the plaintiffs. The bond was dated Sept. 21, 1824, and the plaintiffs had then notice of the terms upon which the delivery was authorized; they refused to receive it upon those terms, but, on the 29th October, made other terms with five of the parties to the bond. The plaintiffs knew the terms on which the delivery was authorized, and refused to accept upon those terms; and the case simply decides that, where the extent of the agent's authority is known to the person who deals with him, the principal cannot be bound outside of that authority. The case is good law, but not specially relevant to the text.

The case cited from 11 Vt. was where the names of seven sureties appeared upon the face of the bond, and only two of the sureties ever executed the same. The instrument was plainly incomplete until executed by all those whose names appeared as parties.

The decision in *Herdman v. Bratten*, 2 Har. *supra*, was that the deed could not be delivered to the party as an escrow. This is an express denial of the doctrine it is cited to sustain. So also the case of *The State v. Chrisman et al.*, 2 Ind. 126, decides that "a bond cannot be delivered as an escrow to the obligee."

In the case of *The Madison, &c., Plank Road Co. v. Stevens*, 10 Ind. 1, Mr. Justice *Perkins* states the decision thus: "One co-obligor may perhaps deliver a bond to another co-obligor as an escrow; but an instrument cannot be so delivered to the obligee or payee, or the agent of either. Such delivery is in law absolute. *Peters*, U. S. Dig. tit. Escrow; *Foley v. Cowgill*, 5 Blackf. 18; *The State v. Crisman*, 2 Ind. 126; *Wright v. The Shelby, &c., Co.*, 16 B. Mon. 4. See 7 Ind. 600; 6 id. 183; 9 id. 25. And parol evidence cannot be given to

vary the legal effect of such delivery, or the terms of the instrument delivered. This has been too often decided to require a citation of authorities to evidence it. *Hiatt et al. v. Simpson*, 8 Ind. 256."

The case of *Foley v. Cowgill* was for a failure to deliver hogs at a certain time and place, according to a written agreement. The defendant answered that the agreement mentioned "was delivered to the plaintiff as an escrow, setting out the contingency on which it was to become binding on the defendant, which, it is averred, had never happened." The Court ruled that if the instrument "be delivered to the obligee on such contingency, the condition is a nullity, and the delivery absolute."

And yet, without attempting to overrule or question these cases in our own State, the Court, in overruling the petition for a rehearing, rests the decision of the case of *Pepper v. The State*, *supra*, except so far as a construction is given to the statute, upon an Alabama case in direct conflict with these repeated rulings of our own Court. If the doctrine upon which the Alabama case proceeds be the law, that a deed or other written instrument may be delivered to the grantee or obligee as an escrow, it of course follows that a surety may make such a delivery to his principal. But, in our opinion, such a position is not only without support, but is in conflict with all authority. In the case of *Worrall v. Munn*, 1 Seld. 229, the instrument, an agreement to execute a conveyance, was delivered conditionally to the agent of the party to whom the deed was afterward to be executed. The Court declares that the law puts the question at rest; that the delivery to the agent was a delivery to his principal. "This was a delivery as an escrow; such a delivery can only be made to a stranger. It cannot be made to the party. If made to the party, no matter what may be the form of the words, the delivery is absolute." *Ward v. Lewis*, 4 Pick. 518; *Fairbanks v. Metcalf*, 8 Mass. 230. Mr. *Parsons* says: "A note, as well as a deed, may be delivered as an escrow, and the law of escrow is substantially the same in both cases. . . . A note cannot be delivered directly to the promisee, to be held by him as an escrow." 1 *Notes & Bills*, 51; *Badecock v. Steadman*, 1 Root (Conn.), 87.

We will examine the cases cited in the original opinion in the case of *Pepper v. The State*, *supra*. *Pawling et al. v. The United States*, *supra*, was an action "upon an official bond given by Ballinger, as collector of the revenue, and signed and sealed by Pawling, Todd, Adair, and Kennedy, as his sureties, who pleaded that they delivered the same as an escrow to one Joseph Ballinger, to be safely kept, &c., upon condition that, if Simon Ingleman and William Patton, named on the face of the bond, should execute the same as co-sureties, then the bond should be delivered to James Morrison, supervisor, on behalf of the United States as their deed, and not otherwise; and that the same never was executed by Ingleman and Patton." Here the representative of the government had notice, on the face of the instrument, that the same was not complete, — not having been executed by all the parties whose names appeared upon its face as co-obligors. To have held this delivery of the instrument obligatory upon the parties when the writing itself proved the execution to be incomplete, would have been in contradiction of its express terms.

In the *United States v. Leffler*, 11 Peters, *supra*, the question under consideration is not discussed either by court or counsel, and the statement of facts

does not disclose whether there had ever been any intentional delivery of the bond, or, if delivered, by whom such delivery was made; and the only question considered was as to the competency of witnesses to prove a conditional execution. Under what circumstances such a defence was admitted does not appear. If the names of other parties appeared on the face of the bond, such a defence would have been admissible under the ruling in *Pawling v. The United States*, *supra*. As no question was made by counsel, it was probably controlled by that decision. If it were otherwise, the validity of such a defence was not so clearly established upon authority, that we are authorized to suppose it would have passed unquestioned when presented in the Supreme Court of the United States for the first time.

The case cited from 3 Barr (Penn.), 308, was where a party, in executing a bond, expressly stipulated that it should not be delivered up until twelve names were obtained, and the persons who were procuring names to the bond for the benefit of third parties agreed that they would not deliver it until it was so executed. It was held that such bond was in their hands as an escrow, and until the condition was performed it could not be delivered. So in the case cited from 2 Leigh, 157, where the deputy-marshal procured a party to sign a forthcoming bond taken upon execution, and agreed not to file the bond in Court until other persons had signed it, it was held that he could not make a valid delivery until the condition was performed. And again in 2 Johns. 248, it was held that a sheriff might deliver a deed to an attorney to be held as an escrow, and only delivered to his client on compliance with the condition. The case of *Sharp v. United States*, 4 Watts, 21, decided that a bond containing in its body two names as sureties, was not binding on one who signed it, unless it was shown that he dispensed with the execution of it by the other. The case in 7 Pick. 91, ruled that "where a bond is signed and sealed *but not delivered to the obligee*, and it is afterward put into the possession of the obligee by a person who has no authority to deliver it, the obligee cannot maintain an action on the instrument."

In the case cited from 7 Ohio, 375, the Court permitted the party receiving the deed to testify that he only received it for the purpose of enabling him to convey to a third party. That the purpose and consideration of the deed was to enable him, as agent of the grantor, to execute a conveyance to another. We are unable to find the case cited, or any case in 4 Johns. having even as remote relation to the subject under consideration as those we have commented upon. In 34 N. Hamp. 460, the rule is stated that, "if a deed is placed in the hands of a depository to be delivered to the grantee upon the death of the grantor, provided it is not previously recalled, but the grantor reserves the right and power of recall at any time, it is not a good delivery."

In 13 Pick. 75, the presumption arising from the fact of a deed having been registered, is discussed.

The case cited from 1 Johnson's Cases decides that, "where the grantor held the deed until the consideration should be paid, and died before payment, there was no delivery."

The remaining authorities cited in *Pepper v. The State*, *supra*, refer to the question of agency; the decision proceeding, so far as those authorities are relevant, upon the ground that the obligor in a bond is the agent of the obligee, and

the obligee is therefore responsible for all his representations to his sureties. It is unnecessary for us to examine these authorities, as the appellant in this case does not assume the position that a person may, as principal, make a valid contract with himself as agent. As a quotation is made from a note by Judge *Redfield* in the April number, 1863, of the American Law Register, p. 346, which rests upon the case of *Pawling v. The United States*, *supra*, we will cite the opinion of the same author in the May number 1864, of the same magazine, p. 402: "It seems to us upon principle that, where there is nothing upon the face of the paper indicating that other co-sureties were expected to become parties to the instrument, and no fact is brought to the knowledge of the obligee before he accepts the instrument calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man interested in the opposite direction to have made inquiry before accepting the security, the fault cannot be said to rest to any extent upon the obligee. And, on the other hand, where the surety intrusts the bond to the principal obligor in perfect form, with his own name attached as surety, and nothing upon the paper to indicate that any others are expected to sign the instrument in order to give it full validity against all the parties, *he makes such principal his agent to deliver the same to the obligee*, because such is the natural and ordinary course of conducting such transactions; and if the principal under such circumstances gives any assurances to the surety in regard to procuring other co-sureties, or performing any other condition before he delivers the bond, and which he fails to perform, *the surety giving confidence to such assurances must stand the hazard of their performance, and cannot implicate the obligee in any responsibility in the matter, unless he is guilty of fraud or rashness in accepting the security.*"

In the note to the April number of the magazine referred to, some authorities are cited as sustaining the application of the doctrine laid down in *Pepper v. The State*, to "promissory notes and other contracts not negotiable, or to negotiable contracts before negotiation." The case cited, *Lloyd v. Howard*, 1 Eng L. & Eq. 227, was where "A, being the payee and holder of a bill of exchange, wrote his name upon it, and gave it to B for the purpose of getting it discounted. B never paid A any money in respect to the bill, *but kept it until it was overdue*, when he delivered it to C without receiving any value for it. *Held*, that there was no indorsement by A to B." The fact that C received the bill when overdue, could give him no right to insist that the apparent indorsement by A to B should be treated as real. The decision in the case of *Palmer v. Richards*, ib. 529, was where "the drawer of a bill of exchange which had been accepted, wrote his name across the back of the bill, and delivered it to A to get discounted, who, instead thereof, while the bill was running, deposited it with B as security for money advanced to himself, without fraud on the part of B. *Held*, that this was a valid indorsement of the bill by the drawer to B." In the case of *Leaf v. Gibbs*, 4 Car. & P. 466, the facts show that the plaintiff, who was the payee of the note, knew that when the defendant signed as surety, the agreement was that his mother was also to sign the note with him, and that she afterwards refused, and the confidential clerk of the plaintiff stated to the agent of the defendant and his mother that the arrangement was, in consequence of such refusal, incomplete. The Court held that the defendant was not liable unless he waived the execution of the note by his mother. Where the payee receives the

instrument with full knowledge of its incomplete condition, in fact it would, it seems to us, be a fraud to permit him to take advantage of its apparently perfect condition. The decision in the case of *Awde v. Dixon*, 5 Eng. L. & Eq. 512, also cited, cannot be reconciled with the American decisions. Mr. Parsons refers to that case as in conflict with the settled law in this country. 1 Bills & Notes, 111. The Court, to sustain their ruling, declare it to be the law in England, that if one signs a negotiable instrument in blank, and delivers it with authority to fill it up for £100, and it is filled up for £200 and negotiated, the maker will not be liable. Lord *Mansfield* did not thus state the law in *Russell v. Langstaffe*, 2 Doug. 514, and in this country such a doctrine is against all authority, and a decision resting upon it cannot be considered in our courts as affording any aid in the determination of legal questions. *Fullerton v. Sturges*, 4 Ohio State, 529; 1 Parsons, *supra*, and authorities cited. The decision in *Awde v. Dixon*, proceeds upon the ground that the writing of the greater sum in the instrument would constitute the crime of forgery, and *Alderson, B.*, placed the decision in the case upon that ground. This is perhaps correct under the English statute, but the Supreme Court of Massachusetts, in *Putnam v. Sullivan*, 4 Mass. 45, held otherwise, on the ground that the instrument had been delivered upon a trust, intending that something should afterward be written, to which the name should apply as an indorsement.

Judge *Redfield*, however, seems to have regarded the English decision in the case of *Swan v. North British, &c. Co.*, 10 Jur. n. s. 102, as conflicting with the view expressed in the note we have quoted from. In that case, "where A was induced by his broker to send him blank forms of transfer, which the broker filled up with numbers and descriptions of shares different from those of the company intended by A, being shares in the defendant's company, and by means of a duplicate key which he had procured to be made without the knowledge of A, obtained certificates from a box of A's, necessary to perfect the transfers, and also forged the names of the attesting witnesses; held, in an action against the company for damages, and for a mandamus to restore the plaintiff's name to the registry, that the acts of the plaintiff were not such as estopped him from showing that the deed of transfer was a forgery." In other words, that where the act of the plaintiff, in trusting the agent with the blank forms of transfer, did not enable the agent to commit a fraud upon a third party, but such fraud could only have been consummated by the addition of larceny and forgery, in such case the plaintiff was not estopped. We admit that we are unable to understand what decision a Court could legitimately render in such a case having any relation to the question now under consideration.

There has also been a case decided by the Supreme Court of Tennessee, 5 Humph. 133, which rests for support upon the cases we have already examined in 4 Cranch and 11 Peters, and in our opinion is not sustained by those authorities. Counsel have cited to us also the case of *The State v. Bodly*, 7 Blackf. 355. There were in that case no questions decided or discussed by the Court involving any point now under consideration. Nor could such questions have been presented in that case, as the bond when delivered contained the name, in the body of the instrument, of the other party who was to execute it, and the clerk who was to receive the bond had actual notice of its imperfect execution, he being the witness called to prove the fact that the sureties signed on condition

that the person whose name was with theirs in the body of the bond should also execute it.

Since the decision in the case of *Pepper v. The State*, the New York Court of Appeals has rendered a decision, holding that where a bond is executed by sureties, and delivered to one of their number to keep until also executed by another surety, that the instrument, until so executed, is held as an escrow. *The People v. Bostwick*, 32 N. Y. 445.

Blackstone defines a delivery as an escrow, to be a delivery "to a *third* person to hold till some conditions be performed on the part of the *grantee*." See also 4 Kent, 454; 1 Coke, 36 a.

In Greenleaf's *Cruise on Real Property*, b. 4, p. 29, it is said: "The delivery of a deed may be either *absolute*, that is to the grantee himself or to some person for him, or else *conditional*, that is to a *third* person, to keep it *till something is done by the grantee*; in which last case it is not delivered as a deed, but as an escrow." The instrument is as perfect and complete in form when delivered as an escrow, as though it were to be delivered absolutely. An instrument delivered as an escrow cannot be withdrawn, but remains in the hands of the holder to be delivered over to the party for whose benefit it was executed, whenever he performs the conditions upon which the original delivery was made. But so long as the instrument remains in the hands of one of the parties, it has no force whatever.

When a decision is based upon so total a disregard of the essentials constituting the delivery of an instrument as an escrow, it may be well to look closely to the authorities which are cited to sustain this line of ruling.

Those authorities are the ones we have already reviewed, with the additional one of *The State Bank v. Evans*, 3 J. S. Green (N. J.), 155, which was a case "where the defendant's name was on the bond as one of the sureties, and he proved that the bond was brought to him by one of his co-sureties, and that when he signed it he delivered it to his co-surety and said to him: 'Now this bond is not to be delivered up *until all the persons named in it have signed it*.'" The Court held that the testimony was admissible, and that it overcame the presumption of any legal delivery arising from the mere fact of the obligee having possession of the bond. This is simply another case where the instrument disclosed upon its face that it had not been executed by all the parties. But while citing authorities which, as we have seen, do not sustain the position they are quoted to support, the case of *The People v. Bostwick* entirely overlooks a decision rendered a year earlier by the Supreme Court of Maine, in which it was held that "where a surety to a bond signs upon the assurance that the principal will procure two other persons specified and known to such surety to sign the bond before he delivers the same, which he fails to do, but this is wholly unknown to the obligee at the time he accepts the bond, such surety is bound to perform the obligation."

The case of *Carr et al. v. Moore*, 2 Ind. 602, was an action of "debt on a bond given to a school commissioner, signed by A. C. and P. As to P. the bond was a forgery. The bond was delivered to C., the principal, to be signed and sealed, and it was redelivered to the commissioner by A. and C. perfected. The commissioner was ignorant of the forgery, the name of P. having been placed upon the bond after its delivery to C. for the signatures. Held, that A. was lia-

ble on the bond." Mr. Justice *Perkins*, who delivered the opinion, says: "Had Carr (the principal) induced Athon (the surety) by fraud to execute the bond, still the school commissioner, being ignorant of the fact, could not, we suppose, be affected by it." There was no proof, however, of such fraud, and the expression must therefore be taken, we suppose, rather as the judgment of the writer of the opinion, than as the ruling of the Court. But it is certainly entitled to consideration and respect.

The case of *Millett v. Parker et al.*, 2 Met. (Ky.) 608, reviews the authorities very fully upon this question, and holds that "a conditional delivery to the principal by a person who subscribes a paper as a surety, will not make such paper a mere escrow. The delivery of the paper, to constitute an escrow, must be made to a third person, and not to a co-obligor; and this whether the instrument be assignable or not."

The case of *The State v. Chrisman et al.*, 2 Ind. 126, was an action of debt upon an administrator's bond. Nelson, one of the defendants, filed the following plea, verified by oath: "That the said supposed writing obligatory in the declaration mentioned, was signed by him upon condition that twelve or fifteen other good men signed it, which was not done; and that unless said number of persons did sign it, it was not to be considered his deed." A demurrer was sustained to the answer. The Court say: "This plea admits the signature to the bond, and does not deny that the same was delivered to the obligee. When so signed and delivered it became absolute." Upon the face of the bond it appears that the name of Nelson was written next following that of the principal, and was followed by the names of six other sureties. The presumption in law is that the names were signed in the order in which they appear upon the instrument, and as the obligee was the State, and the delivery was the filing of the completed instrument with the clerk, no delivery could have been made by Nelson to the obligee upon his signing it. So that the decision of the case results, that no delivery by any of his co-obligors could be made to the obligee of the instrument as an escrow, but the delivery by any of them rendered Nelson liable on the bond.

It was also held in the case of *Taylor & Co. v. Craig*, 2 J. J. Marshall, 449, that a conditional delivery of a promissory note, by a surety in the note to his principal, did not make the instrument an escrow, but that the plaintiff had the right to hold the surety responsible without regard to the condition he had imposed upon the principal at the time of the delivery. The *Bank of the Commonwealth v. Curry*, 2 Dana, 142, recognizes this as the law. Again, in the case of *Smith v. Moberly*, 10 B. Mon. 266, in deciding a similar question, this language is used: "But a delivery of a writing of this character, under such circumstances, to the principal, does not have the effect of characterizing it as a mere escrow; but on the contrary the principal should be considered as the agent of the surety, and empowered by him to pass the writing to the person to whom it may be made payable, and his delivery as being sufficient to make it effectual, unless the payee had notice of the special terms upon which it was signed. The implied discretionary authority to use the note, arising out of its possession by the principal, uncontradicted by its terms or any thing apparent on its face, cannot be restricted by any agreement between the payors themselves, of which the payee had no notice." The Supreme Court of Vermont have also held that

where a note payable to a bank was signed by a principal and one surety, with an agreement on the part of the principal with such surety that he would procure another surety, which was not done, before he procured the note to be discounted, it will constitute no defence, unless the officers of the bank were cognizant of such agreement. *Passumpsic Bank v. Goss*, 31 Vt. 315.

It seems clear, on principle, that a surety cannot make a delivery of a bond to his principal as an escrow, upon condition that other names shall be procured before its delivery to the obligee. The very definition of an escrow involves the holding of the instrument, complete in form, signed and sealed, prepared for delivery to the obligee by a third person who acts as the agent of the obligors and obligee, and who is to make the delivery, not upon some act done by the obligors, but upon the performance of some condition by the obligee. There are but two parties to the instrument, and so long as it is held by the principal it cannot be said to be delivered for any purpose, for it remains still in the hands of the one party, who is only to be bound in any manner upon its delivery to the other. And where there is no delivery of the instrument by the one party executing it, it cannot be said to be held as an escrow.

Can a delivery then be made to the principal, as the agent of his sureties, for any other purpose than an unconditional delivery to the obligee?

The interest of the principal is clearly to procure the acceptance of his bond by the obligee at the earliest moment, and with the least number of sureties. Experience proves, and the law so regards it, that it is a hardship to procure bail, and the interest of the principal is to avoid this hardship. On the other hand, the interest of the sureties is as clear to avoid a delivery until their *pro rata* liability has been reduced by the execution of the bond by other co-sureties.

It is a well-established principle of law, that he who has an interest in the doing of a particular act, cannot accept an agency in the same matter for others whose interests are adverse to his own. A person will not be permitted to assume an agency for others, where the interests of his principal would be in direct conflict with his personal interests. In *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198, *Morton, J.*, says: "It is a rule of law well settled, and founded in the clearest principles of justice and sound policy, that the agent of the seller cannot become the purchaser, or the agent of the purchaser." Judge *Story*, in his work on Agency, § 211, says: "For the like reason (that is, for the same reason that forbids an agent of the seller himself to become the buyer), an agent of the seller cannot become an agent of the buyer in the same transaction." And again, § 9: "Yet we are to understand that they cannot, at the same time, take upon themselves incompatible duties and characters. . . . A memorandum made and signed by a seller, at the request of the purchaser, will not bind." See 3 *Parsons, Contracts*, p. 11; *Smith's Merc. Law*, 149; *Wright v. Dannah*, 2 *Camp.* 203; *Farebrother v. Simmons*, 5 *Barn. & Ad.* 333; *Rayner v. Linthorne*, 2 *Car. & P.* 124; *Cooper v. Smith*, 15 *East*, 103. In *The Utica Ins. Co. v. Toledo Ins. Co.*, 17 *Barb.* 132, it is said: "The general principle that a party cannot act for himself in the same transaction in which he undertakes to act for another is well settled, and the validity of a contract in which he acts, and to which he is a party as agent for a third person and also in his own behalf, does not depend upon the question whether he makes an advantage by the transaction. . . . The character of agent for one party to a contract, and that of principal upon the

other part, are incompatible." *Ex parte Bennett*, 10 Ves. 381; *Florance v. Adams*, 2 Rob. 556; *Beal v. McKiernan*, 6 Louis. 407; *Bentley v. Columbia Ins. Co.*, 19 Barb. 595.

The law, indeed, makes the principal for a special purpose; *i. e.*, the delivery of the instrument, the agent of his sureties. Their delivery of the instrument to the principal, after placing their names upon it, authorizes the principal to make the delivery to the obligee; for such is the channel through which the paper would properly pass in reaching the obligee. And the delivery of the instrument to be by him at once transferred to the obligee, is a delivery entirely consistent with the interests and inclination of the principal, and for such a purpose the delivery is proper. The original contract is between the principal on the bond and the obligee. The compliance with the contract is the delivery of the bond by the principal obligor to the obligee, duly executed by himself and his sureties. The contract between the principal on the bond and his sureties is, that they will enable him to comply with his original contract. For this purpose they sign and deliver to him the instrument, that in the fulfilment of his original contract he may deliver it to the obligee.

Now is it not clear that, as the general purpose of the delivery by the sureties to the principal is that he may make a delivery to the obligee, no conditions imposed upon such delivery will bind the obligee unless they are known to him? In the case of *Pickering v. Busk*, 15 East, 38, Lord *Ellenborough*, C. J., states the law thus: "Strangers can only look to the acts of the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily, and in all cases, limited to his actual authority, the reality of which is afterward to be tried by the fact. *It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject-matter*; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody?" And where the surety signs and delivers the bond to the principal, from whom it would naturally pass to the obligee, are we to suppose that such delivery to the principal was merely for safe custody? The rule laid down in the case cited is, where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe. "*Bayley, J.*: If the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed." And is not the surety upon a bond, who delivers it to his principal in apparent proper condition to be by him delivered to the obligee, and with the general authority to

make such delivery, but circumscribed by a condition unknown to the obligee, bound by the delivery which the principal may make in disregard of the condition? The rule is stated by a learned author thus: "An agent's authority is that which is given by the declared terms of his appointment, notwithstanding secret instructions; or that with which he is clothed by the character in which he is held out to the world, although not within the words of his commission. Whatever is done under an authority thus manifested, is actually within the authority, and the principal is bound for that reason; for he is bound equally by the authority which he actually gives, and by that which, by his own acts, he appears to give. . . . The appearance of the authority is one thing, and for that the principal is responsible." 1 Parsons, Contracts, 44. The surety places the instrument, perfect upon its face, in the hands of the proper person to pass it to the obligee, and the law justly holds that the apparent authority with which the surety has clothed him, shall be regarded as the real authority, and as the condition imposed upon the delivery was unknown to the obligee, therefore the benefit of such condition shall not avail the surety.

Thus, in our opinion, should the rule be established upon principle; and, as it appears by the examination we have made, that the authorities relied upon to sustain a contrary rule are in the main irrelevant, and are in turn quoted to support the cited decisions which are really in point, we are inclined, after a review of all the cases, to regard the real weight of well-considered decisions as sustaining the rule which to us seems to rest also upon a correct principle.

So far as the decision of the case of *Pepper v. The State*, *supra*, rests upon the construction of the statute, and upon the fact of forgery, we are not called upon to review it.

The action of the Court below upon the demurrer was correct.

Judgment affirmed.

It seems to be entirely well settled that where the instrument is of a negotiable character, and is actually negotiated while current, in the due course of business and for value to a *bona fide* party, the surety must be held responsible in all such cases, unless there is something upon the face of the paper to indicate its incompleteness. *Passumpsic Bank v. Goss*, 31 Vt. 315; *McCramer v. Thompson*, 7 Am. Law Reg. N. S. 92, in which latter case the authorities are very carefully commented upon by *Wright, J.* It has sometimes been made a question how far a surety, before he is made to pay any portion of the debt, can be regarded as standing in the light of a creditor to the principal debtor. But it seems, upon principle as well as authority, to be most undeniable that when the surety is compelled to pay the debt, or any part of it, his right attaches to be treated as a creditor from the time of assuming such suretyship.

So, too, securities given to indemnify sureties are founded upon most unquestionable consideration for value. *Uhlen v. Semple*, 5 C. E. Green (20 N. J. Ch.), 288. But it has sometimes been held that the creditor cannot under all circumstances claim the benefit of such securities. *Jones v. Quinnipiack Bank*, 29 Conn. 25. But see *N. B. Savings Inst. v. Fairhaven Bank*, 9 Allen, 175-178. The subrogation of the surety upon the payment of the debt, to all the rights of the creditor is clearly recognized in the American courts, although subrogation, in form, is a remedy derived from the Roman civil law. *Irick v. Black*,

2 C. E. Green (17 N. J. Ch.), 189. And in the case last cited the right of the surety, by means of a bill in equity, to compel the principal debtor, after the debt falls due, to make payment of the debt is fully recognized. And it is here declared that where the creditor has the means of fully indemnifying himself out of the property of the principal debtor, and will be subjected to no loss or delay thereby, he may in equity be compelled by the surety to seek his redress by means of resort to the property of the principal debtor. But this rule is subject to many exceptions; and the better opinion now seems to be that in such cases the surety must assume the debt and accept the transfer of such collateral remedies as the creditor may possess. 1 Story Eq. Jur. §§ 499 *et seq.*, 499 *e.*, and cases cited in note, tenth edition.

The question of the defences to which a surety for the husband to secure the wife's separate estate to her may avail himself is discussed in *Barr v. Greenawalt*, 62 Penn. St. 172.

In cases of insolvency the surety may sometimes compel the creditor to resort to collateral remedies for the collection of his debt before attempting to enforce it against him. Thus it has been held that where the payee of a note had deceased, and the administrator was attempting to enforce the same against a surety, the maker of the note being insolvent, but entitled to a distributive share in the estate of the payee, the surety might compel the administrator first to resort to such distributive share. *Wright v. Austin*, 56 Barb. 13. The authorities are cited in the opinion, and carefully classified.

The operation of the statute of limitations as between surety and principal, and accommodation parties among themselves, and between indorser or drawer and prior parties, is a question of interest and importance. In the first two cases mentioned, it is pretty well settled that the statute begins to run from the time of payment. *Barnsback v. Reiner*, 8 Minn. 59; *Preslar v. Stalworth*, 37 Ala. 402; *Hale v. Andrews*, 6 Cow. 225; *Tillotson v. Rose*, 11 Met. 299; *Reynolds v. Doyle*, 1 Man. & G. 753; *Collinge v. Heywood*, 9 Ad. & E. 633; *Bytes, Bills*, 333; *Angell, Limitations*, 112, 113. But see *Webster v. Kirk*, 17 Q. B. 944.

It would seem from analogy to these cases, and from the fact that the right of action of the indorser or drawer accrues only upon payment, that the statute should begin to run from that time. See *Reynolds v. Doyle*, and *Collinge v. Heywood*, *supra*. But the contrary is held in *Webster v. Kirk*, *supra*, and by the courts of Pennsylvania. *Kennedy v. Carpenter*, 2 Whart. 344; *Farmers' Bank v. Gilson*, 6 Barr, 51. The ground taken in the Pennsylvania cases is, that the indorser must sue upon the paper, as to which the statute begins to run at maturity. Perhaps the rule may be different where it is held that such party is not limited to an action upon the paper, but may sue for money had and received. See *Ellsworth v. Brewer*, 11 Pick. 316. We are informed that a case is now pending in the Supreme Court of Massachusetts, involving this point. It may be well to note that *Reynolds v. Doyle* does not appear to have been before the Court in *Webster v. Kirk*; and that no reasons are given for the decision in the latter case.

BANK-BILLS AND OTHER PAPER TAKEN IN
PAYMENT OF DEBT.

BAYARD v. SHUNK.

(1 Watts & Sergeant, 92. Supreme Court of Pennsylvania, May, 1841.)

Payment in bank-bills. — If a creditor receive current bank-notes in payment, this discharges the debt; though, by reason of the failure of the bank, of which both parties were ignorant at the time, the notes were worthless when received.

In this case, notes of the Commercial Bank of Millington had been received by the plaintiff's attorney in payment of a judgment against the defendant and another. Said bank had actually failed several days before this transaction, though both parties were ignorant of this fact at the time; and the bank-notes were worthless when received. The question was whether the judgment were satisfied.

GIBSON, C. J. Cases in which the bills or notes of a third party were transferred for a debt, are not to the purpose; and most of those which have been cited are of that stamp. Where the parties to such a transaction are silent in respect to the terms of it, the rules of interpretation are few and simple. If the securities are transferred for a debt contracted at the time, the presumption is that they are received in satisfaction of it; but if for a precedent debt, it is that they are received as collateral security for it; and in either case it may be rebutted by direct or circumstantial evidence. But by the conventional rules of business, a transfer of bank-notes, though they are of the same mould and obligation betwixt the original parties, is regulated by peculiar principles and stands on a different footing. They are lent by the banks as cash; they are paid away as cash; and the language of Lord *Mansfield* in *Miller v. Race*, was not too strong when he said, "they are not goods, nor securities, nor documents for debts; but are treated as

money, as cash, in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes ; they are as much money as guineas themselves are, or any other coin that is used in common payments as money or cash." If such were their legal character in England, where there was but one bank, how emphatically must it be so here where they have supplanted coin for every purpose but that of small change, and where they have excluded it from circulation almost entirely. It is true, as was remarked in *Young v. Adams*, 6 Mass. 182, that our bank-notes are private contracts without a public sanction, like that which gives operation to the lawful money of the country ; but it is also true that they pass for cash both here and in England, not by force of any such sanction, but by the legislation of general consent, induced by their great convenience, if not the absolute necessities of mankind. *Miller v. Race* is a leading case which has never been doubted in England or, except in a case presently to be noticed, in America ; and it goes very far to rule the point before us ; for if the wheel of commerce is to be stopped or turned backwards in order to repair accidents to it from impurities in the medium which keeps it in motion, except those which — few and far between — are occasioned by forgery, bank-notes must cease to be a part of the currency, or the business of the world must stand still. The weight of authority bearing directly on the point, is decisively in favor of the position that *bona fide* payment in the notes of a broken bank discharges the debt. Though *Camidge v. Allenby*, 6 Barn. & C. 373 ; s. c., 13 Eng. Com. Law Rep. 202, was not a case of payment in bank-notes, but in the cash notes of a banker who had failed a few hours before, it was held that if they were to be considered as cash, the debt would be discharged ; but if as negotiable paper merely, the holder was bound to use due diligence in procuring payment of them ; and that in either aspect the same result was inevitable. Such notes, however, though formerly called goldsmiths' notes, have not been treated as cash by the merchants or the courts. Strictly speaking, they are ordinary promissory notes ; for none but those of the Bank of England are considered bank-notes in that country. The judges, however, seem to have hesitated as to their precise character in that case ; but they distinctly decided that *bona fide* payment in notes which have received the qualities of money from the conventional laws of trade, is absolute

satisfaction, notwithstanding the previous failure of the drawer. In America we have a decision directly to the point in *Scruggs v. Cass*, 8 Yerg. 175, in which the Supreme Court of Tennessee held that payment in the notes of a bank which had failed, discharged the debt; and in *Young v. Adams*, already quoted, we have a decision of the Supreme Court of Massachusetts to the same purport.

In contrast with these stands *Lightbody v. The Ontario Bank*, decided by the Supreme Court of New York, 11 Wend. 9, and affirmed in the Court of Errors, 13 Wend. 101.¹ The judges and senator who delivered opinions in that case, seem not to have coincided in their intermediate positions, though they arrived at the same conclusion. The chief justice who delivered the opinion of the Supreme Court, appears to have thought that a bank-note stands on the footing of any other promissory note; that as he who parts with what is valuable ought on principles of natural justice to receive value for it in return, a vendor is not bound by an agreement to accept promissory notes should they have been bad at the time of the transaction; and that payment in the notes of an insolvent bank is no better than payment in counterfeit coin. It is obvious that this involves a contradiction; for to confound bank-notes with ordinary promissory notes would subject a debtor, who had paid them away, to the risk of the bank's ultimate solvency. In the Court of Errors, the chancellor, having premised that a State is not at liberty to coin money, or make any thing a legal tender but gold or silver, and consequently that the practice of receiving bank-notes as money is a conventional regulation, and not a legal one, concluded that where the loss has already happened by the failure of the bank, there is no implied agreement that the receiver shall bear it; and that if he were called on to express his sense of the transaction at the time, he would say what natural justice says, that the risk of previous failure in the value of the medium must be borne by the debtor. He would more probably say that he had not thought or formed an opinion about it. Senator Van Schaik also insisted much on the natural justice of the principle, and asserted that no case in the books authorizes an inference that bank-notes are considered as money except in the universally implied condition that the banks which issued them are able to redeem them at the time of the transfer. In *Miller v. Race*, however, we have seen that Lord *Mansfield* asserted on the other hand that they are money without any qualification whatever;

¹ *Post*, 404.

and *Camidge v. Allenby*, as well as *Scruggs v. Gass*, affirms that they may retain the character of money after the period of the bank's failure. To assume that solvency of the bank at the time of the transfer is an inherent condition of it, is to assume the whole ground of the argument. The conclusion concurred in by all, however, was that the medium must turn out to have been what the debtor offered it for at the time of the payment. How does that consist with the equitable principle that there must be, in every case, not only a motive for the interference of the law, but that it must be stronger than any to be found on the other side; else the equity being equal, and the balance inclining to neither side, things must be left to stand as they are (*Fonb. b. 1, c. v. § 3; ib. c. iv. § 25*); in other words, that the law interferes not to shift a loss from one innocent man to another equally innocent, and a stranger to the cause of it?

The self-evident justice of this would be proof, were it necessary, that it is a principle of the common law. But we need go no further in search of authority for it than *Miller v. Race*, in which one who had received a stolen bank-note for a full consideration in the course of his business, was not compelled to restore it. It was intimated in *The Ontario Bank v. Lightbody*, that there was a preponderance of equity in that case, not on the side of him who had lost the note, but of him who had last given value for it. Why last? The maxim, *prior in tempore, potior in jure*, prevails between prior and subsequent purchasers indifferently of a legal or an equitable title. It is for that reason the owner of a stolen horse can reclaim him of a purchaser from the thief; and were not the field of commerce market overt for every thing which performs the office of money in it, the owner of a stolen note might follow it into the hands of a *bona fide* holder of it. But general convenience requires that he should not; and it was that principle, not any consideration of the equities betwixt the parties, which ruled the cause in *Miller v. Race*. But a more forcible illustration of the principle, were the case indisputably law, might be had in *Levy v. The Bank of the United States*, 4 Dall. 234; s. c., 1 Binn. 27; in which the placing even a forged check to the credit of a depositor as cash — a transaction really not within any principle of conventional law — was held to conclude the bank; and to this may be added the entire range of cases in which the purchaser of an article from a dealer has been bound to bear a loss from a defect

in the quality of it. And for the same reason that the law refuses to interfere between parties mutually innocent, it refuses to interfere between those who are mutually culpable; as in the case of an action for negligence. The rule of the admiralty, being that of the civil law, would apportion the loss; but it has no place in any other court.

What is there, then, in the case before us to take it out of this great principle of the common law? The position taken by the courts of New York is, that every one who parts with his property is entitled to expect the value of it in coin. Doubtless he is. He may exact payment in precious stones, if such is the bargain. But where he has accepted without reserve what the conventional laws of the country declare to be cash, his claim to any thing further is at an end. Bills of exchange and promissory notes enter not into the transactions of commerce, as money; but it impresses even these with qualities which do not belong to ordinary securities. The holder of one of them, who has taken it in the ordinary course, can recover on it, whether there was a consideration between the original parties or not; and if no man can part with his property, except subject to an inherent right to have the worth of it, at all events, why should not the drawer of a note be at liberty to show want of consideration against an indorsee, on the ground that no one can pledge his responsibility without having received what he expected for it? Or why, on the supposed moral and public considerations that were invoked in the discussion of the general principle, should the vendee of a chattel be bound to pay for it, though it turn out to be inferior in quality to what he expected it to be? It is because it would stop the wheels of commerce to trace the defect through a series of transactions to the author of it; and dealers must therefore take the risk of it for the premium of the profits. And may not dealers, as well as insurers, take the risk of an event which may have already happened? The creditor does agree to take the risk of the bank's solvency when he makes its notes his own without reserve.

The assertion that it is always an original and subsisting part of the agreement that a bank-note shall turn out to have been good when it was paid away, can be conceded no farther than regards its genuineness. That genuine notes are supposed to be equal to coin, is disproved by daily experience, which shows that they circulate by the consent of the whole communities at their nominal

value when notoriously below it. But why hold the payor responsible for a failure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure afterwards? As the bank may have been actually insolvent before it chose to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse, with the seeds of a mortal disease in him, might refuse to pay for him, though his vigor and usefulness were yet unimpaired; and if we strip a payment in bank-notes of the analogous cash principle, why not treat it as a nullity, by showing that the bank was actually, though not ostensibly, insolvent at the time of the transaction? It is no answer to say the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still further apart, and the bank may have stopped in the mean time; or it may stop at the instant of presentation, when situated at the place where the holder resides. And it may do so even when it is not insolvent at all, but perfectly able eventually to pay the last shilling. This distinction between previous and subsequent failure, evinced by stopping before the time of the transaction or after it, is an arbitrary and impracticable one. To such a payment we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground. But to treat a bank-note as an ordinary promissory note would introduce endless confusion, and a most distressing state of litigation. We should have reclamations through hundreds of hands, and the inconvenience of having a chain of disputes between successive receivers, would more than counterbalance the good to be done by hindering a crafty man from putting off his worthless note to an unsuspecting creditor. No contrivance can prevent the accomplishment of fraud, and rules devised for the suppression of petty mischiefs have usually introduced greater ones.

The case of a counterfeit bank-note is entirely different. The laws of trade extend to it only to prohibit the circulation of it. They leave it, in all besides, to what is the rule both of the common

and the civil law, which requires a thing parted with for a price to have an actual, or at least a potential, existence (2 Kent, 468); and a forged note, destitute as it is of the quality of legitimate being, is a nonentity. It is no more a bank-note than a dead horse is a living one; and it is an elementary principle that what has no existence cannot be the subject of a contract. But it cannot be said that the genuine note of an insolvent bank has not an actual and a legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undissolved; and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. But as the stockholders of a broken bank are the last to be paid, it is seldom unable in the end to pay its note-holders and depositors; and even where nothing is left for them, its notes may be parted with at a moderate discount to those who are indebted to it. We seldom meet with so bad a case as the present, in which every thing like effects, and even the vestiges of the bank, disappeared in a few hours after the first symptoms of its failure. But independent of that, the difference between forgery and insolvency in relation to the transfer of a bank-note, is as distinctly marked as the difference between title and quality in relation to the sale of a chattel.

What then becomes of the boasted principle that a man shall not have parted with his property until he shall have had value, or rather what he expected for it? Like many others of the same school, it would be too refined for our times, even did a semblance of natural justice lie at the root of it. But nothing devised by human sagacity can do equal and exact justice in the apprehension of all men. The best that can be done, in any case, is no more than an approximation to it: and when the incidental risks of a business are so disposed of as to consist with the general convenience, no injustice will in the end be done to those by whom they are borne. Commerce is a system of dealing in which risk, as well as labor and capital, is to be compensated. But nothing can be more exactly balanced than the equities of parties to a payment in regard to the risk of the medium when its worthlessness was unsuspected by either of them. The difference between them is not the tithe of a hair, or any other infinitesimal quantity that can be imagined; and in such a case, the common law allows

a loss from mutual mistake to rest where it has fallen, rather than to remove it from the shoulders of one innocent man to the shoulders of another equally so. The civil-law principle of equality, however practicable in an age when the operations of commerce were few, simple, and circumspect, would be entirely unfit for the rapid transactions of modern times; it would put a stop to them altogether. No man can withhold his praise of the civil law, as a wonderful fabric of wisdom for its day, or deny that it has contributed largely to the best parts of our jurisprudence; but all its materials of superior value have already been worked up in our more commodious modern edifice; and if the cultivation of an acquaintance with it is to beget a desire to substitute its abstract principles for the maxims of the common law, — the accumulated wisdom of a thousand years' experience, — it were better that our jurists should die innocent of a knowledge of it. This longing after its peculiar doctrines began with Mr. Verplanck's commentary on the decision of the Supreme Court of the United States in *Laidlaw v. Organ*, 2 Wheat. 178; and it was subsequently indulged by the Supreme Court of his own State, so far as to sap the foundation of its own sound decision in *Seixas v. Woods*, 2 Caines, 48. In *Laidlaw v. Organ*, the purchaser refused to disclose his information that the article had risen in the market, and there was therefore room for a pretence of inequality in the circumstances of the parties; but where they have acted, as in this case, in equal ignorance, and with equal good faith, that pretence, flimsy as it was even there, is wanting, and the law, on principles of justice as well as convenience, refuses to interfere between them. It is therefore unnecessary to insist on the provisions of our statute of 1836, which enacts that "it shall be lawful for the officer charged with the execution of any writ of *feri facias*, when he can find no other real or personal estate of the defendant, to seize and take the amount to be levied by such writ, of any current gold, silver, or copper coin belonging to the defendant, in satisfaction thereof; or he may take the amount aforesaid of any bank-notes, or current bills for the payment of money, issued by any moneyed corporation, at the par value of such notes." At least for the purpose of seizure in execution, therefore, bank-notes are money; and had the sheriff returned that he had seized these notes as the defendant's property instead of the property itself, it would not be pretended that the debt was undischarged. But though he returned

the facts specially, the notes were received as cash by the plaintiff's attorney; and after that, on no principle whatever could the transaction be thrown open. The plaintiff's case is an unfortunate one, but we could not relieve him without imposing an equal misfortune on the defendants.

Judgment affirmed.

See next case and note.

ONTARIO BANK v. LIGHTBODY.

(13 Wendell, 101. Court of Errors of New York, December, 1831.)

Payment in bank-bills. — If the holder of commercial paper receive bank-notes in payment of the same, the risk of the solvency of the bank which issued the notes is upon him who gave them, in the absence of agreement; and therefore if the bank had actually failed or stopped payment at the time the notes were received, and this was unknown at the time to the holder, this will not constitute payment of his paper, though such bank-notes were current at the place where they were received, at that time.

ASSUMPSIT to recover the amount of a note of the Franklin Bank, paid to the plaintiff by the Ontario Bank, the defendant below, on a draft drawn by him upon his funds on deposit. The Franklin Bank had actually stopped payment at this time, though the facts were unknown to both parties, and though the notes of that bank were current at that time at the place where they were received.

WALWORTH, CHANCELLOR. The question to be decided is, which of the parties shall sustain the loss in reference to the bill of the Franklin Bank, received by Lightbody, paid upon the presentment of his check. The law is well settled, that where the note of a third person is received in payment of an antecedent debt, the risk of his insolvency is upon the party from whom the note is received, unless there is an agreement or understanding between the parties, either express or implied, that the party who receives the note is to take it at his own risk. The same principle is applicable to the notes of an incorporated bank, except that as to the latter there is always an implied understanding between the parties that if the bill, at the time it is received, is in fact what the party receiving it supposes it to be, he is to run the risk of any future failure of the

bank. This implied agreement between the parties arises from the fact that bills of this description, so long as the bank which issued them continues to redeem them in specie at its counter, are by common consent treated as money, and are constantly passed from hand to hand as such. The receiving them as money, however, is not a legal, but only a conventional regulation, adopted by the common consent of the community; as no State is authorized to coin money, or to pass any law by which any thing but gold or silver coin shall be made a legal tender in the payments of debts. This principle of considering bank-bills as money, which the receiver is to take at his own risk, cannot, therefore, be carried any further than the conventional regulation extends; that is, to consider and treat them as money so long as the bank by which they are issued continues to redeem them in specie, and no longer. When, therefore, a bank stops payment, its bills cease to be a conventional representative of the legal currency of the country, whether the holder is aware of that fact or not; from that moment the bills of such bank resume their natural and legal character of promissory notes, or mere securities for the payment of money; and if they are afterwards passed off to an individual who is equally ignorant of the failure of the bank, there is no agreement on his part, either express or implied, that he shall sustain the loss which has already occurred to the original holder of the bills. Upon the principles applicable to cases of mutual mistake, as those principles are administered in courts of equity, it is now settled that, if an individual passes to another a counterfeit bill, or an adulterated coin, both parties supposing it genuine at the time it was received, the one who passes it is bound to take it back and give him to whom it was passed a genuine bill or an unadulterated coin in lieu thereof, or, in other words, to make good the loss. *Markle v. Hatfield*, 2 Johns. 455. That principle of natural justice is equally applicable to the case under consideration. The actual loss had been sustained by the failure of the bank while the plaintiffs in error were the holders and owners of the bill; and it is a maxim of the law, that the loss is to him who was the owner at the time such loss happened, if both parties were ignorant of the loss at the time of making their contract. Here, the one party intended to pay, and the other supposed he was receiving the bill of a bank which was redeeming its bills at its counter. Suppose the inquiry had been made of the defendant, "Do you expect to sustain the

loss if the bank should fail before you shall have parted with this bill?" The answer, according to the implied understanding of the parties, arising from the nature of the transaction, and considering the bills of specie-paying banks as money, would certainly have been the affirmative. But if he had been asked, "Do you understand that you are to bear the loss, if it should hereafter be ascertained that the Franklin Bank has now actually failed and stopped payment?" he would unquestionably have answered, "No; in that event, as the loss would have happened while you was the owner of the bill, natural equity requires that you should bear it; and I shall expect you to take back the bill and give me one which is good."

The principle adopted by the Supreme Court in this case, is also the only one which can protect the honest and unsuspecting against the frauds of those who might be disposed to take advantage of the ignorance of others as to the failure of a banking institution. A person who has heard of the failure of a bank while he has some of its bills on hand, will naturally be tempted to get rid of them for the purpose of avoiding a loss he might otherwise sustain; and if he was disposed to be a rogue, he would keep his knowledge of the failure to himself until he could pay out his bills to those who were ignorant of the fact, and in such case he would escape with impunity, if those to whom he passed them were required to prove that he was aware of the failure at the time they received the bills from him. And even if the first person to whom a bill was passed should be so fortunate as to obtain proof to establish the fraud, if he had honestly parted with the bill while he was yet ignorant of the fact, so that the one who had received it from him could not call for repayment, the original holder of the bill, who was guilty of the fraud, would still escape with impunity. On the whole, I am satisfied with the judgment of the Supreme Court in this case: not only as perfectly legal and just, but also as that which is most consistent with the substantial interests of the community, and founded upon a correct principle of public policy.

VAN SCHMICK, Senator. A powerful effort was made by the counsel for the plaintiffs in error, and many authorities were cited to prove that *bank-notes* have been treated and viewed as *money* both in this country and in England; and he argued that payment in good faith, in bills current at the time and place of the transaction,

constituted a full discharge of the obligation of a debtor to his creditor, even though, as in the present case, the bank, in the bills of which the payment was made, had failed previous to the making of the payment.

The authorities adduced by the counsel were misapplied ; and I consider it a full answer to the argument which was founded upon them, to say, that there is no adjudged case in the books to authorize the inference that *bank-notes* have ever been considered as money, except under the universally implied understanding, that the banks which issued the paper were able to redeem or to substitute a full equivalent for their issues ; and therefore it is not a sound inference from the cases to say that the paper of a bank shall be entitled to the same consideration as money, after the bank has failed, that it had before, in consequence of the confidence in its stability. To test this position, it will be sufficient to select a few of the strongest cases. *Miller v. Race*, 1 Burr. 452, was the case of a bank-note stolen from the mail, and which fell into the hands of the defendant, an innkeeper, honestly in the course of his business. The Court decided that the action would lie upon the general course of business, and the consequences to trade and commerce, which would be much incommoded by a contrary decision. Lord *Mansfield*, in that case, says that bank-notes ought not to be compared to what they do not resemble, — goods, securities, or documents for debts ; that they are treated as *money*, as *cash* by the general consent of mankind. “ They are as much *money* as guineas themselves are, or any other current coin.” The importance attached to the influence of the decision in this case upon trade and commerce is evidently overrated. The equity of the case itself is on the side of the party who last gave, in the pursuit of an honest calling, a valuable consideration for the money. Circumstances might change this ; but, generally speaking, traders and others cannot be upon their guard to learn whether the sums of money they receive, suitable to the extent of their business, are stolen or found. But the case itself, and the character given by Lord *Mansfield* to bank-notes as money, assumes the fact of the unquestioned solvency of the maker of the note. This is all important ; for there is a vastly wider difference between the note of an insolvent and that of a solvent bank, than there is between a good note and an equal amount in guineas. In the case of *The Bank of the United States v. The Bank of the State of Georgia*, 10

Wheat. 333,¹ notes issued by the Bank of Georgia had been altered so as to increase the amount of the promise to pay from \$590 to \$5900. Having been received in the Bank of the United States, they were, in the ordinary course of their exchanges, remitted to the Bank of Georgia, which received them as *genuine*, but subsequently discovering the alterations, offered to return them. The tender to return the notes was not made until nineteen days after their receipt. The case came before the Supreme Court of the United States upon a writ of error from the Circuit Court of Georgia. The Supreme Court reversed the judgment of the Court below upon two points: 1. Because the Circuit Court had refused to instruct the jury, that, if they believed the evidence, the plaintiffs were entitled to recover the balance due by their customer's book; 2. That the plaintiffs were entitled to interest from the commencement of the action. Mr. Justice *Story*, who delivered the opinion of the Court, did not consider that this was a case of a special deposit, but the notes were paid as money upon general account, so that, according to the course of business, and the understanding between the parties, the identical notes were not to be restored, but an equal amount in cash was to be paid; that the notes passed into the general funds of the Bank of Georgia, and became its property. Upon this ground, the action as to form was maintained. But in going into the merits, great stress was laid by the Court upon the fact that these were not the notes of another bank, or the security of a third person, but were received and adopted by the bank as its own genuine notes, in the most absolute and unconditional manner; and the whole general reasoning of the case, separate from the principles of other cases which are brought to sustain collateral points, goes upon the broad ground that a bank is bound to know its own paper. This position is laid down with so much emphasis, that it must be considered as the controlling reason for the judgment of the Court. How the question of a special deposit would have been treated by the Court, if the paper had been the altered notes of the United States Bank itself, or of any other bank, cannot now be known; neither does the case reach the question of the notes of a third bank, being at the time of the exchange or deposit, an insolvent institution.

In 1 *Ld. Raym.* 738, it was held, an action did not lie against the assignee of a bank-bill, because he had it for a valuable consideration; and it always is an inquiry whether the bearer came fairly

¹ *Post*, 650.

by it. None of the cases proceed exclusively upon the mere similitude between bank money and cash, and the answer is the same to all the cases which hold bank paper equal to money, as it must be to that in which Lord *Mansfield* declares that bank-notes are as much money as guineas are; that is, that the judges always allude to genuine and solvent notes. There are some individual opinions of judges, however, which appear to militate against this position. In the case of *Young v. Adams*, 6 Mass. 182, a payee recovered against a payer the amount of a \$5 counterfeit bill, which had been given him with other money. It is impossible to find in this case any thing to support the doctrine, that a payment made in the bills of an insolvent bank is valid. Yet the judge says, argumentatively, in a supposed case, "When the bills paid are true and genuine, the responsibility of the bank is, we believe, at the risk of the receiver. But it is admitted that this construction goes "farther in favor of the currency of bank-notes or bills, than the authorities warrant in regard to private notes or bills, or even bankers' notes in England when accepted in payment." But the suggestion is afterwards qualified in the following manner: "Private notes, that is, of individuals or companies, whether incorporated or not, where the currency of them is not regulated by some notorious and peculiar usage, when accepted in payment or discharge of an existing contract, are taken at the risk of the payer." And the converse of this proposition must be, that such notes as are regulated by notorious and peculiar usage are at the risk of the payee. But if this proposition were the foundation of a case to be decided, it is not certain that this would be a satisfactory view of the question, since between the circulation and appreciation of public bank-notes, issued by different institutions, there is as great a difference as between public bank-notes as such, and private notes, whether of private banks or individuals. To say, because the community has become by habit inspired with confidence in the trustworthiness of banks and bank paper, that therefore a payment made in the paper of a broken bank, not knowing it to be broken, discharges the debt, is a principle not discoverable in any system of ethics or jurisprudence. Policy may be deemed to require that bank circulation should be protected by a leaning in support of its reputation with the public; but it is unnecessary. If worthy, it will stand without the aid of legal decisions, which tend to pervert the right, and which some judges

believe give a dangerous facility to bank circulation. The convenience of a bank, and the honesty of its administration, are its safeguards. When these are withdrawn, law can render to its circulation no effectual aid.

In ordinary use, and for many legal purposes, as in a bequest in a will or when bills are taken on execution, bank-notes are deemed and taken to be money; but after the payer has become insolvent, they can be so considered only for the purpose of identification. In real payments, they must possess money's worth. Not having that intrinsically, it is to be sought for in the ability of the issuer to redeem his paper. The strict legal definite character given to bank paper by our laws is, that of promises to pay and evidences of debt, and this is at least consistent with the reality; and when so considered, the case stands in a new light. When a bank issues a note or bill, it creates a debt. By law, this debt must be paid in specie, if it be demanded. Into the engagement thus to pay, every bank necessarily enters, when it receives its charter. By the terms of this agreement, neither party regards bank paper as money. The circulation of its bills is derived from its credit; and its credit is the concomitant of its acknowledged and permanent solvency. Its bills circulate like coined metal, so long as their representative character remains unimpaired; but a bank-bill is not money, according to the understanding between the parties, any more than it is money according to the signification of that word. It is admitted that bank-notes, as the circulating medium of the country, have acquired the denomination of money, from their convenience as a substitute for gold and silver, and their utility in promoting the objects of trade, and in exchanging the products of industry; but after a bank has failed, its notes are deprived of those characteristics of money which entitled them to that appellation by the custom of trade, while they continued at a value equivalent with specie, or nearly so. Their convertibility into specie being lost, and their power of circulation having departed, not one of the ingredients of money remains, and they can be legally defined only as unpaid promissory notes.

But it may be well to show more particularly that our statutes do not yield to bank-notes the character of money, even while they circulate. In the act concerning "monied corporations," 1 R. S. 589, § 1, they are called notes or other evidences of debt. In the Session Laws of 1830, c. 243, § 1, p. 265, the designation is still

more explicit: "Notes, bills, or other evidence of debt, purporting to be a bank-note." In the acts incorporating banks, their appellation is evidence of debt: and when mentioned in connection with bonds and promissory notes, they are not distinguished as money, but are regarded in the light of promises to pay. Besides, the inherent qualities and appropriate characteristics of all bank paper, are those which belong to promissory notes, "or documents for debts," and so I think we must consider them for the purpose of this adjudication. If bank-notes be considered as mere promissory notes, then the rule to be applied to this case is, that "paper is no payment of a precedent debt; it is always taken under the condition to be payment if the money be paid in convenient time." *Ward v. Evans*, 2 *Ld. Raym.* 928. This is the settled law, and the custom of trade in this country, "unless the party make it his own by agreement, or by the act of negotiating it. The cases of *Puckford v. Maxwell*, 6 *T. R.* 52, and *Owenson v. Morse*, 7 *id.* 64, were decided upon modifications of this rule. The paper, possessing no value at the time the contract was made, and there being no agreement that the party was to take it at his own risk, was held to be a nullity, and the party might act as if no such bill had been given. In *Markle v. Hatfield*, 2 *Johns.* 455, the same principle prevailed; the party did not receive the compensation intended; it was a forged bank-note. In *Johnson v. Weed*, 9 *Johns.* 311, the Court says: "The books all agree that there must be a clear and special agreement that the vendor shall take the paper absolutely as payment, or it will be no payment, if it afterwards turns out to be of no value." The fact of an agreement is matter for the jury.

Owing to the extraordinary aptitude of the people of this country for business and trade, — to the immense amount of our resources, which the application of industry and science are developing with constantly accumulating benefits to the community, and which require the indispensable aid of capital to bring them to market, and to the nearly total absence of specie in large districts of country, — paper money has been rendered the common medium of the exchanges of property, or of barter, to a greater extent among us than in any other nation on the globe. Its great convenience and the hitherto indispensable necessity for its use have created the idea that it should be clothed with the attributes of real money; and this opinion necessarily gains ground among the undiscerning; but it ought not to be permitted to subvert the established princi-

ples of moral justice. When a citizen sells an article for cash, he is entitled to demand for it, not false, or spurious, or insolvent, but good money, whether it be in coin or bills; and when a man pays a debt, the medium of payment must turn out to be what he represented it to be at the time of payment. The preceding view of the subject demonstrates that the understanding that bank-notes shall pass current as cash is entirely conventional, and cannot be traced to an original principle; but the understanding that money shall be good at the time of payment is an original and always subsisting part of the agreement; it goes to the root of every contract; it relates to its essence and substance; and, in strict morals, this consideration must take precedence of every other implication that may arise upon a bargain for money, or in the payment of a debt. In the case before the Court, the bill was not at the time what the receiver supposed it to be. The tacit agreement and understanding between the parties was, what the universal understanding is in every traffic for money; that the paper is good at the time of passing; and this is a previously existing and more important understanding than that it circulates as money.

Mr. Gallatin, in his essay on the Currency and Banking of the United States, p. 29, says: "A payment made in bank-notes is a discharge of the debt, the creditor having no recourse against the person from whom he has received the notes, unless the bank had previously failed." This sagacious statesman did not fail to perceive that the inherent defects of paper money rendered it impossible to make it fulfil at all times the offices of real money, and that in the event of the failure of the bank, a question of equity might arise between innocent parties to the transfer and acceptance of these notes. He does not merely reserve the point, but expresses a decided opinion, without appearing to apprehend that the currency of paper money will be retarded by the promulgation of an incontrovertible position. The principle adopted by Mr. Gallatin is founded upon common usage and general consent, by which every person receives bank money which has become current, under the implied understanding that it is good and the bank solvent. If a bank has failed before the transfer of its notes from one person to another, the primary condition of the contract has been touched in its vital part; the understanding is not fulfilled; the contract is a nullity. The want of knowledge at Utica of the failure of the bank at New York cannot be permitted to remove the

consequences that ensued immediately upon the failure. The money must be lost in the hands of him who held it when the bank failed. On great moral and public considerations, I can have no hesitation in deciding the case upon this principle, and especially as it will have a tendency to prevent attempts which have frequently been made to commit frauds by the circulation of insolvent bank paper.

There was no default in the party who received bad money for good. He transmitted the note immediately to New York, and, upon its return, offered it to the bank, but it was refused.

I am therefore of opinion that the judgment of the Supreme Court ought to be affirmed.

On the question being put, Shall this judgment be reversed? all the members of the Court present, twenty in number, with one exception voted in the negative. So the judgment of the Supreme Court was affirmed.

The rule declared in *Ontario Bank v. Lightbody* is certainly more consistent with natural justice and fair dealing than that maintained in *Bayard v. Shunk*. Mr. Justice *Story*, in his work on Promissory Notes, § 389, after stating, as the rule, that declared in *Ontario Bank v. Lightbody*, says, in a note: "After all, the point seems to resolve itself more into a question of fact, as to the intent, than as to law; and it must and ought to turn upon this, whether taking all the circumstances together, the bill was taken as absolute payment by the holder, at his own risk, or only as conditional payment, he using due diligence to demand and collect it."

Fogg v. Sawyer, 9 N. Hamp. 365, is a well-considered case which supports the New York doctrine. In delivering the opinion of the Court, *Parker, C. J.*, said:—

"It is contended, in this case, that the equity is equal between the parties,—that there must be a loss upon the bills which were received by the plaintiff, and that, both parties being equally innocent, the law should not interfere. It is not quite clear that both parties were equally innocent in this transaction. The case finds that it did not distinctly appear that the failure of the bank was known to the defendant, but it did appear that it was unknown to the plaintiff. A suspicion, however, that the defendant had knowledge of the failure, at the time he made the purchase, can have no effect upon the present decision, as no question of that kind has been submitted to the jury.

"There are cases where the parties being equally innocent, or equally guilty, neither can support an action against the other; but the principle upon which they are founded is not applicable to this case. On the supposition that neither knew of the failure of the bank, at the time of the sale, the plaintiff contracted to sell the oxen, and the defendant to pay therefor a certain price. There is nothing in the case to show any agreement, in fixing upon the price, that payment

was to be received in bills of the Chelsea Bank. The parties, then, must have contemplated a payment in money, or in something which was equivalent to money, and usually received as such. In fact the plaintiff might have declined receiving any thing but coin, and the defendant could not have performed his contract except by the payment of coin, if it had been required. The right to require coin was waived, but still there is nothing to show that an equivalent was not to be received.

“When, therefore, the plaintiff received the bills, he received them, and the defendant paid them, as money. It was in that way only that the defendant could perform what he had undertaken to do, which was, to pay a sum of money. The bills represented money, — were doing the office of money, — and should have been of the value of money at the place where they purported to be redeemable, and convertible into money. The plaintiff was as much entitled to receive good bills, if he consented to take bills, as he would have been to have received good coin, in case the payment had been made with specie: and it is not doubted that in such case, if the payment had been made in counterfeit coin, the plaintiff would have been entitled to recover. The same is true of counterfeit bills, when they have been passed in payment. *Young v. Adams*, 6 Mass. 182; *Markle v. Hatfield*, 2 Johns. 455; *Grafton Bank v. Hunt*, 4 N. Hamp. 488.

“The case of a payment in bills of a broken bank cannot be distinguished, in principle, from that of a payment in counterfeit money. From the time of the failure of the bank they cease to be the proper representatives of money, whether they are, at the time, near to, or at a distance from, the bank. They may have a greater value than counterfeit bills, but in neither case has the party received what in the contemplation of both parties he was entitled to receive, if the contract was to pay a certain sum. In neither case has he received money, or its representative. The sum contracted to be paid has not been paid in money, or any thing which by usage passes as money, or which was entitled at the time to represent it; and the party has, therefore, failed to pay what he contracted to pay. *Wentworth v. Wentworth*, 5 N. Hamp. 410. Counterfeit coin may contain a portion of good metal, and thus have some value, but this would not make it a good medium of payment. Entire worthlessness, or not, is not, therefore, the criterion.

“It can make no difference whether the party making the payment knew, at the time, that the bank had failed. That is of as little consequence as it is whether he knew that the pieces of coin or bills which he paid were counterfeit. Having undertaken to pay a sum of money, the question is, whether he has performed his obligation.

“It is not sufficient that the bills, in this case, might have been current at the place of payment, when the payment was attempted to be made. They should have been current, or convertible into specie, at the place where they purported to be redeemable. When the defendant paid them as money, he took this risk upon himself. If they were not so, they were not what they purported to be, and what they were taken for.

“There is no equity in the case which should lead to a different result. When the bank failed the loss fell upon the defendant, as the holder of the bills, if he held them at that time. If he had not received information of his loss, that is

of no consequence. The bills were no longer redeemed on demand, and a loss, greater or less, had accrued. There is no equity in transferring this loss to the plaintiff, because he afterwards received the bills supposing them to be equivalent to money. If he had agreed to take the risk, that would have presented the case in a different aspect. Or if he had agreed to exchange the oxen for the bills, that might have altered the case. But the bare reception of the bills in payment cannot be considered as evidence of an agreement to take the risk, because the defendant offered them as money, and the plaintiff received them as such, without knowledge of the failure.

“If the bills had been convertible into money, at the bank, when the plaintiff received them, they would have been what they purported to be, and the risk of a subsequent failure, while they were in his possession, would have been with the plaintiff.

“The plaintiff having offered to return the bills in a reasonable time, is entitled to treat the case as if they had not been received, and to recover the balance due on the sale of the oxen.

“*Judgment for the plaintiff.*”

There are several other cases which sustain this view. See *Wainwright v. Webster*, 11 Vt. 576; *Frontier Bank v. Morse*, 22 Me. 88; *Timmis v. Gibbins*, 14 Eng. Law & E. 64; *Harley v. Thornton*, 2 Hill (S. C.), 509; *Thomas v. Todd*, 6 Hill (N. Y.), 340; *Townsend v. Bank of Racine*, 7 Wis. 185; *Westfall v. Braley*, 10 Ohio State, 188.

But the Pennsylvania doctrine has been adopted in several States. See cases cited by Chief Justice *Gibson*; also *Lowrey v. Murrell*, 2 Port. Ala. 280; *Corbit v. Bank of Smyrna*, 2 Harr. Del. 235, *Layton, J.*, dissenting; *Ware v. Street*, 2 Head, 609; *Edmunds v. Digges*, 1 Grat. 359.

See also *Commonwealth v. Stone*, 4 Met. 43; *Snow v. Perry*, 9 Pick. 539; *Alexander v. Dennis*, 9 Port. Ala. 174; *Alexander v. Byers*, 19 Ind. 301; *Dakin v. Anderson*, 18 Ind. 52; *Aldrich v. Jackson*, 5 R. I. 218; *Houghton v. Adams*, 18 Barb. 545; *Baker v. Bonesteel*, 2 Hilton, 397; *Gilman v. Peck*, 11 Vt. 516; *Ex parte Blackburne*, 10 Ves. 204; *Bank of the United States v. Bank of Georgia*, *post*, 650.

THE PHOENIX INSURANCE COMPANY v. JOHN ALLEN.

(11 Michigan, 501. Supreme Court, July, 1863.)

Payment by paper of third party. Duty of creditor. — Where a party receives a draft as conditional payment of a debt due him, his right of action upon the debt is suspended until the draft is properly presented for payment and payment refused. By receiving such draft, the creditor accepts the duty of doing every thing with respect thereto which is necessary to fix the liability of the parties; and the *onus* is upon him to show that he has performed that duty when he seeks to recover upon the original cause of action.

THE case is stated in the opinion of the Court.

CHRISTIANCY, J. This was an action of assumpsit brought by Allen, the plaintiff below, against the company, to recover the amount of a loss by fire under a policy issued by the company to Allen.

The declaration contained counts upon the policy, and the common counts. The plea was the general issue. It appeared from the evidence introduced by the plaintiff (and of these facts there was no dispute), that on the twentieth day of April, 1861, the loss under the policy had been adjusted by compromise between Allen and the company (the latter acting through one Holden, their agent, having power to adjust losses), at the sum of \$1106.25, which was agreed by said agent to be paid by a draft drawn by him on the general agents of the Phoenix Company at Cincinnati "payable in Chicago exchange." The draft for the amount was so drawn on the same day, upon R. H. and H. M. Magill, general agents of the company at Cincinnati, payable to the order of Allen at one day's sight. This draft was indorsed by Allen to Stephens and Beatty, of Detroit, for whose use the action was brought: the plaintiff, however, retaining some interest in it (but what, did not appear). Stephens and Beatty indorsed and transmitted this draft to Harrison and Hooper, their agents in Cincinnati, for presentment and demand of payment, who duly presented it to the drawees, on the second of May, 1861, and received and accepted from the drawees, as and for a compliance with said draft or order, a bill of exchange drawn by J. H. Bussing & Co., bankers at Cin-

cinnati, upon Hoffman and Gelpecke, bankers at Chicago, and indorsed by said R. H. and H. M. Magill, general agents as aforesaid. This last draft was in the following words and figures: —

“\$1106.25. Walnut Street Bank: Cincinnati, May 2, 1861.

“Pay to the order of R. H. and H. M. Magill, general agents, \$1106.25 current funds.

“G. H. BUSSING & Co.

“To Hoffman and Gelpecke, Chicago, Ill.”

This draft was received by Stephens and Beatty, at Detroit, from their agents in Cincinnati, on the fourth day of May, 1861, and on the twenty-fifth day of the same month they transmitted it by mail to their agents in Chicago, for presentment and demand of payment; and, on the twenty-ninth day of the same month, it was duly presented to Hoffman and Gelpecke, the drawees, and payment demanded, which payment was refused; and it was thereupon protested for non-payment, and due notice thereof given.

It was admitted there were daily mails between Detroit and Cincinnati, between Detroit and Chicago, and between Detroit and Grand Rapids, and that the several times occupied in the transmission of the mails between these several points were as follows: Between Detroit and Cincinnati, from twelve to twenty-four hours; between Detroit and Chicago, from twelve to fourteen hours, and between Detroit and Grand Rapids, less than twelve hours; There was no other evidence touching the question of diligence in presenting the draft for payment.

The draft was offered in evidence by the plaintiff, under the common counts, but rejected by the Court on the ground that it was not negotiable, because payable in current funds, and not in cash. As the plaintiff does not complain of the judgment, and we think the draft was properly excluded for another reason, it is only important to notice this point for the bearing it may be supposed to have upon another question in the cause. But in the absence of all evidence that any thing else than cash was treated as current funds in Chicago, we do not see how the Court could assume judicially to know the fact or presume it; until this should be made to appear, the current funds in which it was made payable, should, we think, be held to be such funds only as were current by law. We must therefore treat this draft as a negotiable bill of exchange payable in money. It does not appear to have

been obtained for the purposes of exchange, that is, for the purpose of transmitting funds to Chicago; but it is clear that it was received in payment of the first draft or order drawn by Holden and indorsed to Stephens and Beatty, or, in other words, in payment of the sum due the plaintiff for his loss under the policy. Whether received in absolute or conditional payment, was a question for the jury upon the evidence. Had they found it was received as absolute payment, they could not have found for the plaintiff, as his remedy would then clearly have been confined to the draft itself, which the plaintiff was not allowed to introduce in evidence. It is only, therefore, in respect to its reception as conditional payment that we are to consider the question of the plaintiff's right to sue for the original indebtedness, and the question of diligence in presenting the draft for payment. Its reception as conditional payment would operate as a suspension of the plaintiff's original right of action till the draft should be properly presented for payment, and such payment was refused. See authorities cited 2 Am. Lead. Cas. 182. And we think the plaintiff, by such acceptance, must also be understood to have accepted the duty of doing every thing with respect to the paper which was necessary to fix the liability of the drawer and indorsers, and the *onus* of proving that he has performed this duty when he seeks to recover upon the original cause of action for which the paper was received.

In *Jennison v. Parker*, 7 Mich. 355, it was held by a majority of this Court that where a draft drawn by a third person was indorsed by the debtor, and by him sent to the creditor to be applied when paid, the creditor made the paper his own, and could not sue upon the original debt if he neglected the steps necessary to hold the debtor liable as indorser. We see no reason for departing from the rule there laid down. We think the same reasons apply here, not only with reference to the indorser, but with at least equal force to the drawers also; since, if the drawers have been discharged by the neglect of the holder to present for payment in due time, the indorsers (who, so far as the present question is concerned, may be considered as the company for whom they acted) would lose their remedy over upon the drawers; for there is nothing in the case to show that the drawers could be held liable without due presentment.

In 2 Am. Lead. Cases, p. 183, upon a careful review of the cases

it is laid down as a general principle of the law merchant that, "a plea that the plaintiff has taken the note or bill of a third person on account of the cause of action, is a sufficient bar to the suit, which can only be removed by showing that the ordinary course of business has been pursued with reference to the security thus taken, and that it has, notwithstanding, proved inadequate as a means of payment." As a general rule we think this is just and equitable to all parties, though we think the same special circumstances affecting the time of presentment and notice might be shown as in cases between indorser and indorsee. Thus understood, the rule is substantially the same as that which requires presentment to be made within a reasonable time, having reference to the ordinary course of business, and the circumstances of each particular case. The law upon this subject, as a general rule, adapts itself to the ordinary course of business, or, more properly speaking, the ordinary course of business constitutes the general rule of law. When the ordinary course of business has established a rule as to time of presentment, which the law has recognized, courts are bound judicially to notice it without proof, as in the case of bills payable at a specified day or a certain number of days after date; and doubtless the ordinary course of business may, to some extent, be judicially noticed in other cases. But where the law has adopted no rule as to time of presentment, except that it shall be within a reasonable time, as in the case of bills payable at sight, like the present, the Court cannot, without overlooking the objects for which such presentment and notice of non-payment are required, say, as matter of law, that any delay is reasonable beyond that which may be fairly required in the ordinary course of business without special inconvenience to the holder; or by the special circumstances of the particular case. And in a case like the present, where the paper does not appear to have been obtained for mere purposes of exchange, but in payment of a precedent debt; and was not put in circulation, but detained by the plaintiff for twenty-one days before it was transmitted for presentment; if we cannot take judicial notice that this delay was greater than required by any considerations of necessity or convenience in the usual course of business, we certainly cannot, without evidence upon the point, determine, as matter of law, that this length of time was required by any such considerations, or authorized by any usage or course of business which we can judi-

cially notice without proof. If there was any thing in the special circumstances of the case to require it, or to excuse the delay, those circumstances should have been proved. But no such evidence was given or offered. Nothing whatever was shown to excuse or explain the delay, or to show why the paper might not, with equal convenience to the holder or any other person, have been sent by the first, or next succeeding mail. There was, therefore, no evidence before the jury tending to show that the time was reasonable. The time — the unexplained delay of twenty-one days — was shown. But there was no evidence of any usage or course of business, nor any special circumstances connected with the particular case, from which the jury could be authorized to draw any inference that the time was reasonable. And the burden of proof upon this point rested upon the plaintiff. So far as the jury are to pass upon the question of reasonable time, their verdict must be based upon evidence before them. If from the naked fact of the length of time, the jury are to determine its reasonableness without any evidence bearing upon the point, they must necessarily determine it as a question purely of law; and this is not within their province. The Court therefore erred in submitting the question to the jury.

Had there been evidence upon the point, the questions might have arisen, which were so fully and ably discussed by the counsel, whether the reasonableness of the time was a question of fact for the jury, or, the facts being undisputed, a question of law for the Court, or, if disputed, of mixed law and fact, to be decided by the jury under the charge of the Court upon the law. But the plaintiff, upon whom the burden of proof rested, having failed to produce any evidence tending to show that the time was reasonable, and there being no such evidence in the case, these questions are not properly before us, and we shall not enter upon their discussion. But whatever view may be taken of these questions, we can see no ground on which the counsel for the plaintiff could be allowed to read to the jury, and to comment upon decided cases upon the question found in the books of reports. So far as the question was one of law, these cases and the arguments upon them were for the consideration of the Court only; so far as it was a question of fact, it was to be decided by the jury upon the facts given in evidence in the regular course of the trial. See *Darby v. Ouseley*, 36 Eng. L. & Eq. 519; and the finding of courts or

juries in other similar cases would be wholly inadmissible as evidence in any stage of the trial.

As there was no evidence tending to show the time to be reasonable, and the Court held the question to be one of fact for the jury, and permitted the reported cases to be read to them against the objection of defendant's counsel, the jury must naturally have inferred that they were at liberty to consider those decided cases as evidence upon which they had a right to base their verdict. The cases could only be properly read to, or considered by, the jury upon the hypothesis that they were to decide the question as one of law; and such, in this case, must have been the result, so far as their verdict may have been in any way influenced by the cases and the argument based upon them.

The judgment must be reversed, with costs, and a new trial granted.

In most States of the Union taking a note or bill for a pre-existing debt is *prima facie* only conditional payment, and the burden is upon the debtor, in an action upon the original debt to show that the intention was otherwise. Story, Promissory Notes, §§ 104, 117, 389, 438, and numerous authorities cited. But in Maine, Massachusetts, Vermont, Indiana, and Louisiana, the presumption is that the paper is taken in absolute payment, if it is negotiable; the presumption, however, may be repelled by proof. *Descadillas v. Harris*, 8 Greenl. 298; *Wiseman v. Lyman*, 7 Mass. 286; *Spooner v. Rowland*, 4 Allen, 485; *Wait v. Brewster*, 31 Vt. 516; *Arnold v. Sprague*, 34 Vt. 402; *Gaskin v. Wells*, 15 Ind. 253; *Hunt v. Boyd*, 2 La. 109.

The ruling in the principal case that the party who takes a bill or note for a pre-existing debt must take the proper measures to charge the parties to the same, on pain of discharging the party from whom he received it, is well settled. See Story, Bills of Exchange, § 109; *ib.* Promissory Notes, § 117, and authorities cited.

But if the debtor give his creditor a bill drawn on another who has no effects in his hands, and who refuses to accept it, the creditor may treat the bill as waste paper, and resort to his original demand. *Stedman v. Gooch*, 1 Esp. 3, per Lord *Kenyon*. See *Kearslake v. Morgan*, 5 T. R. 513; *Tarleton v. Allhusen*, 2 Adol. & Ellis, 32; *Puckford v. Maxwell*, 6 T. R. 52; *Ilsey v. Jewett*, 2 Met. 168.

As to the receipt of forged paper, see *Bank of the United States v. Bank of Georgia*, *post*, 650.

FORGERY.

CANAL BANK v. BANK OF ALBANY.

(1 Hill, 287. Supreme Court of New York, May, 1841.)

Recovery of money paid upon forged indorsement. Notice. — Money paid by the acceptor of a bill to an innocent holder under a forged indorsement of the payee may be recovered, if seasonable notice of the forgery be given.

ASSUMPSIT against the defendants, indorsees of a draft drawn on the plaintiffs by the Montgomery County Bank, payable to the order of E. Bentley, Jr. Bentley's indorsement was forged, and the paper finally passed for value and without notice into the hands of the defendants. It was then presented to the plaintiffs and paid. A little over two months afterwards the acceptors notified the defendants that the payee's name was a forgery, and called upon them to refund, which they refused to do; whereupon this action was brought to recover the sum paid.

After speaking of the competency of Bentley as a witness, the Court proceeded; the opinion being delivered by

COWEN, J. On the merits, there was nothing in the nature of the transaction to conclude the plaintiffs against showing the forgery. They had done no act giving currency to the bill on the strength of Bentley's name. Even had they accepted it on the day when it was drawn, the defendants could have holden them concluded only in respect to the genuineness of the drawer's name, he being their immediate correspondent. Chitty, Bills, 336, 7 Am. ed. of 1839. And the act of payment could amount to no more. *Id.* Neither acceptance nor payment, at any time, nor under any circumstances, is an admission that the first, or any other indorser's name is genuine. *Ib.* 628. In point of title, then, the case of the defendants was the same as if the name of Bentley had not appeared on the bill. They have obtained money of the plaintiffs without right, and on the exhibition of a forged

title as a genuine one. The plaintiffs paid their money under the mistaken belief thus induced that the name was genuine. To a note or bill payable to order, none but the payee can assert any title without the indorsement of such payee; not even a *bona fide* holder. *Ib.* 286 *a*, 430.

But it is said, the equities of the parties are equal, and the defendants having possession, must prevail. No doubt the parties were equally innocent in a moral point of view. The conduct of both was *bona fide*, and the negligence or rather misfortune of both the same. It was the duty, or, more properly, a measure of prudence, in each to have inquired into the forgery, which both omitted. But this raises no preference at law or equity in favor of the defendants, but against them. They have obtained the plaintiffs' money without consideration; not as a gift, but under a mistake. For the very reason that the parties were equally innocent, the plaintiffs have the right to recover; and that was conceded throughout, in the authority cited on another point by the defendants' counsel. *United States Bank v. Bank of Georgia*, 10 Wheat. 333, 354.¹ The whole course of argument and authority in that case, went on the fault of the party who paid the money. It was likened to the case of a bank paying a check, on which the name of the drawer was forged, which was again assimilated to the acceptance of a bill of exchange, where the drawer's name is forged. It was said that, in such cases, the payor or acceptor takes upon himself the knowledge of his correspondent's handwriting, and shall be concluded. Even that is going a great way, unless some *bona fide* holder has purchased the paper on the faith of such an act. But it is sufficient to distinguish the case, that it goes on the superior negligence of the party paying or accepting. At page 355, the Court draw an express distinction between the effect of acceptance or payment as a recognition of the drawer's, and the indorser's handwriting. It is said, the forgery of an indorsement is not a fact which the acceptor is presumed to know. And perhaps the decision in the case cited should be rested entirely on negligence in the *Bank of Georgia*. *Id.* *ib.* p. 344; also the case of the *Gloucester Bank v. The Salem Bank*, 17 Mass. 33, cited 10 Wheat. 350.

But, it is said, the plaintiffs here delayed giving notice of the forgery, from the twenty-eighth of March till the seventh of June.

¹ *Post*, 650.

Under what circumstances, is not disclosed ; for the point of delay was not made at the trial. That is a sufficient reason why it should not be listened to here. But I am not willing to concede that delay in the abstract, as seems to be supposed, can deprive the party of his remedy to recover back money paid under the circumstances before us. It is said, the defendants had indorsers behind them ; and by delay, they were prevented from charging them, by giving seasonable notice. Admit this to be so ; the plaintiffs did not stand in the relation of a holder. They were the drawees, and advanced the money by way of payment. They would never, therefore, think of notice to the defendants, till they accidentally discovered the forgery. If there had been any unreasonable delay after such discovery, another question would be presented. I infer from the rigor of the case cited by the defendants' counsel, *Cocks v. Masterman*, 9 Barn. & C. 902, that he would exact as great, indeed greater diligence in giving notice, than is necessary to fix an indorser. There the plaintiffs had paid to the defendants, the holders, an acceptance, purporting to be in the name of the plaintiffs' customers. The bill was drawn payable at the plaintiffs' bank. The next day, discovering the forgery, they, on the same day, gave notice to the defendants and the indorsers. This was held too late. The Court even declined to give an opinion, whether notice on the very day of payment would have entitled the plaintiffs to recover ; but held, that notice on the very day was at all events necessary, and that short of this, the plaintiffs were not entitled to recover. They said the holder must not, by want of notice, be deprived of the right to take steps against the parties to the bill on the very day when it was paid ; and they admitted that this was requiring one day increased diligence, beyond what would have been required in the ordinary case of dishonor. In the latter case, they allowed that notice on the next day would have been in season. In a previous case of payment under the like circumstances, notice having been given on the very day, the bankers who paid for their customers, were allowed to recover. *Wilkinson v. Johnson*, 3 Barn. & C. 428. In this earlier case, the payment was made for the honor of indorsers, whose bankers the plaintiffs were. Both cases were treated by the Court, as standing on the same principles, though, in the latter case, they do not put it distinctly on any principle. In the earlier case, they said the plaintiffs were not the drawees, or acceptors,

nor the agents of any supposed acceptors. The same thing may, I take it, be said of the latter case, though the plaintiffs assumed to pay for the acceptors. They could scarcely have intended to pay as mere agents for the acceptors, an act which would have extinguished the bill, and cut them off from a remedy against the drawers and indorsers. Where a bill or note is payable at a bank, and no express direction given by the principal to the bank, on its coming in with indorsers, the bank, of course, takes the paper as a purchaser, or holder; and, for its own indemnity, presents it to the principal for payment, on the very day, or as soon as may be. Thus, there is a good chance to detect the forgery of his name; and hurry the notices to the other parties. Whatever forgeries there may be, are soon brought to light. In the earlier of the two cases cited, the Court said. "the general rule of law is clear and not disputed; viz., that money paid under a mistake of facts, may be recovered back, as being paid without consideration." In the latter case, the Court do not deny the rule, nor that it would apply to the case before them. But to enforce it, they require an almost impracticable diligence. I doubt whether this case can be sustained, except upon its own peculiar circumstances, if it can be sustained at all. In all the previous cases, where a recovery had been denied, there was carelessness, or delay, or both. *Smith v. Mercer*, 6 Taunt. 76, was much like *Cocks v. Masterman*, and there had been a neglect to discover the forgery and give notice, for a week's time. The case of *Price v. Neale*, 3 Burr. 1354, was one of palpable neglect, in both payment and delay. Some other cases turn on similar principles. *Barber v. Gingell*, 3 Esp. 60; *United States Bank v. Bank of Georgia*, and *Gloucester Bank v. Salem Bank*, before cited; *Levy v. Bank of United States*, 1 Binn. 27; s. c., 4 Dall. 234. If *Cocks v. Masterman* is to be followed, it must, I think, be on the same principle. The plaintiffs paid on the faith of their correspondent's name. The former were not named as drawees; but they had a superior knowledge of their correspondents' handwriting, which they neglected to exert. It might, therefore, have been reasonable to require that they should overcome the objection of neglect, by such a speedy movement as to save all possible advantage to the holder, against the prior parties. But, where each party enjoys only the same chance of knowledge, no case demands any thing more than reasonable diligence in giving notice, after a discovery of the forg-

ery. The common case of paying forged bank-notes, is one instance. And navy and victualling bills, have been treated as standing on the same footing. *Jones v. Ryde*, 5 Taunt. 488; *Bruce v. Bruce*, ib. 495, note. These are cases of transferring notes from one to another, which turn out to be unavailable by reason of a forgery, in respect to which both parties are equally ignorant, the one being no more guilty of neglect than the other; indeed, neither being negligent, but both being imposed upon under the exercise of ordinary diligence. At all events, it does not lie with the payor to complain of the very neglect imputable to himself. Neglect to give notice, after discovering the forgery, is another matter. *Vide Chitty, Bills*, Am. ed. of 1839, p. 463. If the indorsers are to be charged, as such, why should not the accidental delay in discovering the forgery, on a paid bill especially, operate as an excuse for not giving them immediate notice?

The defendants did not disclose their agency, and must, therefore, as between them and the plaintiffs, be taken to have acted as principals. They obtained the money of the plaintiffs on a bill of exchange, payable to the order of Bentley, under a forged indorsement of his name. Money has been successively paid by mistake of the several indorsees, the plaintiffs, the defendants, the Bank of New York, &c., and the remedy by each is plain. It is by action over, each against his respective indorser. The bill has never been put in a regular course of negotiation, for want of Bentley's name. No one who has advanced money on it, therefore, obtained what he supposed he had got; and the indorsers, beside being liable as such, may each be sued, as having received money without consideration.

The proof offered, relative to the custom of banks to collect paper received by them as agents, without communicating the name of their principal, would have disclosed a case in which it would be apparent that the defendants might or might not have been agents. The object of the proposed proof was, to supply the want of direct evidence, that notice of the agency had been given by them at the time. Till they had superadded proof of another custom, for banks never so to receive paper and collect as principals, the proposed evidence could have had no tendency to affect the plaintiffs with such notice. Knowledge that the defendants might be acting as agents, was not enough. This is so of every

man ostensibly transacting business as a principal. *Vide Mills v. Hunt*, 20 Wend. 431. The proof offered and rejected was, therefore, irrelevant.

New trial denied.

If the forgery of the payee's signature were on the paper when the drawer put it into circulation, the acceptor cannot recover from an innocent holder to whom he has paid it. See *Hortsmann v. Henshaw*, *ante*, 57, and note.

But if the forgery is owing to the fault or carelessness of the drawer, he must bear the loss. *Young v. Grote*, 4 Bing. 253; *Morrison v. Buchanan*, 6 Car. & P. 18. See *Belknap v. National Bank of North America*, 100 Mass. 376, cited in full in note to *Bank of the United States v. Bank of Georgia*, *post*, 650.

Respecting the question of the reasonable time within which notice of the forgery should be given, it has been said that the strict rule of the English courts has not been adopted in this country; and that what is reasonable time will depend upon the circumstances of each case. 2 Parsons, Notes and Bills, 598, 599. See *Bank of Commerce v. Union Bank*, 3 Comst. 230; *Worrall v. Gheen*, 39 Penn. State, 388; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Pope v. Nance*, Minor (Ala.), 299; *Bank of St. Albans v. Farmers' and Mechanics' Bank*, 10 Vt. 141; *McKleroy v. Southern Bank of Kentucky*, 14 La. An. 458. See also *Chitty, Bills*, 431, 432.

The late case of *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281, discusses this subject of negligence in its relation to the rules of the Clearing House. The facts will sufficiently appear in the opinion of the Court, delivered by

COURT, J. This action is brought by the plaintiffs to recover the amount of a check drawn upon them and paid by them through the agency of the Boston Clearing House, there being no funds of the drawer in their hands at the time of the payment.

It is well settled by recent decisions that money paid to the holder of a check or draft drawn without funds may be recovered back, if paid by the drawee under a mistake of fact. And though the rule was originally subject to the limitation that it must be shown that the party seeking to recover back had been guilty of no negligence, it is now held that the plaintiff in such case is not precluded from recovery by laches in not availing himself of the means of knowledge in his power. It is otherwise if the money is intentionally paid without reference to the truth or falsehood of the fact, and with the intention that the payee shall have the money at all events. *Appleton Bank v. McGilvray*, 4 Gray, 518; *Kelly v. Solari*, 9 Mees. & W. 54; *Townsend v. Crowdy*, 8 C. B. N. S. 477. This right to recover back the money, however, will in no case be permitted to prejudice the payee who has suffered any damage, or changed his situation in respect to his debtor by reason of the laches of the plaintiff, or his failure to return the check within a reasonable time.

It is plain, in the case here presented, that if the plaintiffs had paid this check at their own counter under a mistake of fact, they could have maintained this action to recover it back. Is there any thing in the manner in which the payment was in fact made, or in the relation of the parties to each other as members of the Clearing House Association, which prejudicially affects this right?

It is declared by the articles, which were signed by the plaintiff and defendant banks, to be the object of the association to effect at one time and place the daily exchanges between the several associated banks, and the payment of the balances resulting from such exchanges. An early hour is fixed for making these exchanges, and a later time in the day for the receipt and payment of balances from the debtor and creditor banks. These settlements are made, not from an examination in detail of the vouchers presented, but from memoranda and tickets accompanying them. And any mistakes resulting from this mode of settlement are to be adjusted directly between the banks which are parties therein. It is further provided that "whenever checks are sent through the Clearing House which are not good, they shall be returned, by the banks receiving the same, to the banks from which they were received, as soon as it shall be found that said checks are not good; and in no case shall they be retained after one o'clock." Under this arrangement, the payment required of the Clearing House to a creditor bank, upon a check presented, must be regarded as only provisional until the hour of one o'clock, to become complete only in case the check is not returned at that time. And if by any mistake of fact the return of the check is not so made, then, as between the two banks, it is to be treated as a payment made under a mistake of fact, precisely to the same extent, and with the same right to reclaim, which would have existed if the payment had been made by the simple act of passing the money across the counter directly to the payee on the presentation of the check. The manifest purpose of the provision is, to fix a time at which the creditor bank may be authorized to treat the check as paid and be able to regulate with safety its relations to other parties.

We cannot adopt the theory that a failure to present a bad check, before the time named, to the bank sending it through the Clearing House, works an absolute forfeiture, and is in itself a perfect bar to any action to recover the amount of such check. The whole arrangement, in all its provisions and declared purposes, is to be construed together. And the law will not construe any portion so as to subject parties to a penalty or forfeiture of their rights, where other reasonable interpretation can be given which will give effect and consistency to the whole. The parties have, in terms, affixed no penalty or forfeiture to the stipulation under consideration; and a failure to comply with its terms must leave the parties in the same position, and precisely as they would stand when a payment is made under a mistake of fact in the ordinary way. After one o'clock, the defendants, upon the failure to return the check, had the right to consider it paid, and to treat it so in their dealings with others. The report finds that the delay in its return was occasioned by a mistake on the part of the messenger, a mistake which was quite as much a mistake of fact as if it had been produced by the false time of a clock which was relied on. And no suggestion is made that there has been any change of circumstances, after the time when the defendants had a right to treat the check as paid, and before it was returned, which would now subject the defendants to damage or loss, and render it unjust for the plaintiffs to recover.

We have considered the case as if the agreement required the return of the check to the bank from which it was received before or at one o'clock; but it will be noticed that the stipulation is, that the check shall in no case be *retained* after one o'clock. If it were necessary to save a penalty or a forfeiture, it might

be held that the delivery of it to a messenger before one o'clock, to be returned to the bank depositing it, with sufficient time, in the absence of any accident or mistake, to reach the bank before that hour, would be a compliance with its terms, although it was not in fact delivered until some minutes after.

Judgment on the verdict for the plaintiffs.

See *Overman v. Hoboken City Bank*, 2 Vroom, 563; s. c., 1 Vroom, 61.

THE PRESIDENT, DIRECTORS, &c., OF THE BANK OF THE
UNITED STATES *v.* THE PRESIDENT, DIRECTORS, &c., OF
THE BANK OF THE STATE OF GEORGIA.

(10 Wheaton, 333. Supreme Court of the United States, February, 1825.)

Bank's own forged bills received as genuine.—If a bank receives from a debtor forged notes purporting to be its own, as genuine, and passes them to the credit of the debtor, who acts in good faith, the receiving bank is bound by such credit; and it cannot recover from the depositor and debtor the amount of the forged bills.

THE case is stated in the opinion of the Court.

STORY, J. This is a case of great importance in a practical view, and has been very fully argued upon its merits. The Bank of Georgia having originally issued the bank-notes in question, they were, in the course of circulation, fraudulently altered, and having found their way into the Bank of the United States, the latter presented them to the former, who received them as genuine, and placed them to the general account of the Bank of the United States, as cash, by way of general deposit. The forgery was not discovered until nineteen days afterwards, upon which notice was duly given, and a tender of the notes was made to the Bank of the United States, and by them refused. Both parties are equally innocent of the fraud, and it is not disputed, that the Bank of the United States were holders, *bona fide*, for a valuable consideration. Under these circumstances, the question arises, which of the parties is to bear the loss, or, in other words, whether the plaintiffs are entitled to recover, in this action, the amount of this deposit.

Some observations have been made as to the form of the action, the declaration embracing counts for the balance of an account stated, as well as for money had and received, &c. But, if the

plaintiffs are entitled to recover at all, we see no objection to a recovery upon either of these counts. The sum sued for is the balance due upon the general account of the parties, and it is money had and received to the use of the plaintiffs, if the transaction entitled the plaintiffs to consider the deposit as money. It is clearly not the case of a special deposit, where the identical thing was to be restored by the defendants; the notes were paid as money upon general account, and deposited as such; so that, according to the course of business, and the understanding of the parties, the identical notes were not to be restored, but an equal amount in cash. They passed, therefore, into the general funds of the Bank of Georgia, and became the property of the bank. The action, has, therefore, assumed the proper shape, and if it is maintainable upon the merits, there is no difficulty in point of form.

We may lay out of the case, at once, all consideration of the point, how far the defendants would have been liable, if these notes had been the notes of any other bank, deposited by the plaintiff, in the Bank of Georgia, as cash. That might depend upon a variety of considerations, such as the usages of banks, and the implied contract resulting from their usual dealings with their customers, and upon the general principles of law applicable to cases of this nature. The modern authorities certainly do, in a strong manner, assert, that a payment received in forged paper, or in any base coin, is not good; and that if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. To this effect are the authorities cited at the bar, and particularly *Markle v. Hatfield*, 2 Johns. 455; *Young v. Adams*, 6 Mass. 182; and *Jones v. Ryde*, 5 Taunt. 488.¹ But, without entering upon any examination of this doctrine, it is sufficient to say that the present is not such a case. The notes in question were not the notes of another bank, or the security of a third person, but they were received and adopted by the bank as its own genuine notes, in the most absolute and unconditional manner. They were treated as cash, and carried to the credit of the plaintiff in the same manner, and with the same general intent, as if they had been genuine notes or coin.

Many considerations of public convenience and policy would authorize a distinction between cases where a bank receives forged

¹ See *Ontario Bank v. Lightbody*, *ante*, 625, and note.

notes purporting to be its own, and those where it receives the notes of other banks in payment, or upon general deposit. It has the benefit of circulating its own notes as currency, and commanding thereby the public confidence. It is bound to know its own paper, and provide for its payment, and must be presumed to use all reasonable means, by private marks and otherwise, to secure itself against forgeries and impositions. In point of fact, it is well known, that every bank is in the habit of using secret marks, and peculiar characters, for this purpose, and of keeping a regular register of all the notes it issues, so as to guide its own discretion as to its discounts and circulation, and to enable it to detect frauds. Its own security, not less than that of the public, requires such precautions.

Under such circumstances, the receipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty, which the public have a right to require. And in respect to persons equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former. There is nothing unconscionable in retaining the sum received from the bank in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and therefore to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will, therefore, presume a damage actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons received in payment of a debt, there has been a qualification ingrafted on the general doctrine, that the notice and return must be within a reasonable time; and any neglect will absolve the payor from responsibility.

If, indeed, we were to apply the doctrine of negligence to the present case, there are circumstances strong to show a want of

due diligence and circumspection on the part of the Bank of Georgia. It appears from the statement of facts, that all the genuine notes of that bank of the denomination of one hundred dollars, in circulation at this time, were marked with the letter A ; whereas twenty-three of the forged notes of one hundred dollars bore the marks of the letter B, C, and D. These facts were known to the defendants, but unknown to the plaintiffs ; so that by ordinary circumspection the fraud might have been detected.

The argument against this view of the subject, derived from the fact, that the defendants have received no consideration to raise a promise to pay this sum, since the notes were forgeries, is certainly not of itself sufficient. There are many cases in the law, where the party has received no legal consideration, and yet in which, if he has paid the money, he cannot recover it back ; and in which, if he has merely promised to pay, it may be recovered of him. The first class of cases often turns upon the point, whether in good faith and conscience the money can be justly retained ; in the latter, whether there has been a credit thereby given to or by a third person, whose interest may be materially affected by the transaction. So that, to apply the doctrine of a want of consideration to any case, we must look to all the circumstances, and decide upon them all.

Passing from these general considerations, it is material to inquire, how, in analogous cases, the law has dealt with this matter. The present case, does not, indeed, appear to have been in terms decided in any court ; but if principles have been already established, which ought to govern it, then it is the duty of the Court to follow out those principles on this occasion.

The case has been argued in two respects : first, as a case of payment, and, secondly, as a case of acceptance of the notes.

In respect to the first, upon the fullest examination of the facts, we are of opinion, that it is a case of actual payment. We treat it in this respect, exactly as the parties have treated it ; that is, as a case where the notes have been paid and credited as cash. The notes have not been credited as notes, or as a special deposit : but the transaction is precisely the same as if the money had been first paid to the plaintiffs, and instantaneously the same money had been deposited by them. It can make no difference that the same agent is employed by both parties, the one to receive, and the other to pay and credit. Upon what principle is it, then, that the

Court is called upon to construe the act different from the avowed intention of the parties? It is not a case where the law construes an act done with one intent to be a different act, for the purpose of making it available in law: to do that, *cy pres*, which would be defective in its direct form. Here the parties were at liberty to treat it as they pleased, either as a payment of money, or as a credit of the notes. In either way it was a legal proceeding, effectual and perfect; and as no reason exists for a different construction, we think that the parties, by treating it as a cash deposit, must be deemed to have considered it as paid in money, and then deposited; since that is the only way in which it could legally become, or be treated as cash. Nor is there any novelty in this view of the transaction. Bank-notes constitute a part of the common currency of the country, and, ordinarily, pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to; and, as Lord *Mansfield* observed, in *Miller v. Race*, 1 Burr. 452, they are not, like bills of exchange, considered as mere securities or documents for debts. If this be true in respect to bank-notes in general, it applies, *a fortiori*, to the notes of the bank which receives them; for they are then treated as money received by the bank, being the representative of so much money admitted to be in its vaults for the use of the depositor. The same view was taken of this point in the case of *Levy v. The Bank of the United States*, 4 Dall. 234; 1 Binn. 27, where a forged check had been accepted by the bank, and carried to the credit of the plaintiff (a depositor) as cash, and upon a subsequent discovery of the fraud, the bank refused to pay the amount. The Court there said: "It is our opinion, that when the check was credited to the plaintiff as cash, it was the same thing as if it had been paid; it is for the interest of the bank that it should be so taken. In the latter case, the bank would have appeared as plaintiffs; and every mistake which could have been corrected in an action by them may be corrected in this action, and none other." The case of *Bolton v. Richard*, 6 Durn. & East, 139, is not, in all its circumstances, directly in point; but there the Court manifestly considered the carrying of a check to the credit of a party, was equivalent to the transfer of so much money in the hands of the banker, to his account.

Considering, then, the credit in this case as a payment of the

notes, the question arises, whether, after a payment, the defendants would be permitted to recover the money back ; if they would not, then they have no right to retain the money, and the plaintiffs are entitled to a recovery in the present suit.

In *Price v. Neal*, 3 Burr. 1355, there were two bills of exchange, which had been paid by the drawee, the drawer's handwriting being a forgery ; one of these bills had been paid, when it became due, without acceptance ; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawee brought an action against the holder to recover back the money so paid, both parties being admitted to be equally innocent. Lord *Mansfield*, after adverting to the nature of the action, which was for money had and received, in which no recovery could be had, unless it be against conscience for the defendant to retain it, and that it could not be affirmed that it was unconscientious for the defendant to retain it, he having paid a fair and valuable consideration for the bills, said, " here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it. But it was not incumbent upon the defendant to inquire into it. There was notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up. The other bill he actually accepts, after which, the defendant, innocently and *bona fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having, without any scruple or hesitation, paid the first ; and he paid the whole value *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man. But, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant." The whole reasoning of this case applies with full force to that now before the Court. In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession of it before the time it was paid or acknowledged. So that there is no pretence to allege,

that there is any legal distinction between the case of a holder before or after the acceptance. Both were treated in this judgment as being in the same predicament, and entitled to the same equities. The case of *Neal v. Price* has never since been departed from; and, in all the subsequent decisions in which it has been cited, it has had the uniform support of the Court, and has been deemed a satisfactory authority. The case of *Smith v. Mercer*, 6 Taunt. 76, was a stronger application of the principle. There, the acceptance was a forgery, and it purported to be payable at the plaintiff's, who was a banker, and paid it, at maturity, to the agent of the defendant, who paid it in account with the defendant. A week afterwards the forgery was discovered, and due notice given to the defendant. But the Court (Mr. Justice *Chambre* dissenting) decided, that the plaintiff was not entitled to recover. Two of the judges proceeded upon the ground, that the banker was bound to know the handwriting of his customers; and that there was a want of caution and negligence on the part of the plaintiff. The Chief Justice, without dissenting from this ground, put it upon the narrower ground, that during the whole week the bill must be considered as paid, and if the defendant were now compelled to pay the money back, he could not recover against the prior indorsers; so that he would sustain the whole loss from the negligence of the plaintiff. The very case occurred in the *Gloucester Bank v. The Salem Bank*, 17 Mass. 33, where forged notes of the latter had been paid to the former, and, upon a subsequent discovery, the amount was sought to be recovered back. The authorities were there elaborately reviewed, both by the counsel and the Court, and the conclusion to which the latter arrived was, that the plaintiffs were not entitled to recover, upon the ground, that by receiving and paying the notes, the plaintiffs adopted them as their own, that they were bound to examine them when offered for payment, and if they neglected to do it within a reasonable time, they could not afterwards recover from the defendants a loss occasioned by their own negligence. In that case, no notice was given of the doubtful character of the notes until fifteen days after the receipt, and no actual averments of forgery until about fifty days. The notes were in a bundle when received, which had not been examined by the cashier until after a considerable time had elapsed. Much of the language of the Court as to negligence, is to be referred to this circumstance. The Court said, "the true

rule is, that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly with more strength, when the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not; and if he pays them, or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

Against the pressure of these authorities there is not a single opposing case: and we must, therefore, conclude, that both in England and America, the question has been supposed to be at rest. The case of *Jones v. Ryde*, 5 Taunt. 488, is clearly distinguishable, as it ranged itself within the class of cases, where forged securities of third persons had been received in payment. *Bruce v. Bruce*, 5 Taunt. 495, is very shortly and obscurely reported; but from what is there mentioned, as well as from the notice taken of it by Lord Chief Justice *Gibbs*, in *Smith v. Mercer*, 6 Taunt. 77, it must have turned on the same distinction as *Jones v. Ryde*, and was not governed by *Price v. Neal*.

But if the present case is to be considered, as the defendants' counsel is most solicitous to consider it, not as a case where the notes have been paid, but as a case of credit, as cash, upon the receipt of them, it will not help the argument. In that point of view, the notes must be deemed to have been accepted by the defendants, as genuine notes, and payment to have been promised accordingly. Credit was given for them, as cash, by the defendants for nineteen days, and, during all this period, no right could exist in the plaintiffs to recover the amount against any other person from whom they were received. By such delay, according to the doctrine of Lord Chief Justice *Gibbs*, in *Smith v. Mercer*, 6 Taunt. 76, the prior holders would be discharged: and the case of the *Gloucester Bank v. The Salem Bank*, 17 Mass. 33, adopts the same principle; so that there would be a loss produced by the negligence of the defendants. But, waiving this narrower view, we think the case may be justly placed upon the broad ground, that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of

acceptances of forged drafts. If there be any difference between them, the principle is stronger here than there; for there, the acceptor is presumed to know the drawer's signature. Here, *a fortiori*, the maker must be presumed, and is bound to know his own notes. He cannot be heard to aver his ignorance; and when he receives notes, purporting to be his own, without objection, it is an adoption of them as his own.

The general question, as to the effect of acceptances, has repeatedly come under the consideration of the courts of common law. In the early case of *Wilkinson v. Lutwidge*, 1 Str. 648, the lord chief justice considered that the acceptance of the bill was, in an action against the acceptor, a sufficient proof of the handwriting of the drawer; but it was not conclusive. In the subsequent case of *Jenys v. Fawler*, 2 Str. 946, the lord chief justice would not suffer the acceptor to give the evidence of witnesses, that they did not believe it the drawer's handwriting, from the danger to negotiable notes; and he strongly inclined to think that actual forgery would be no defence, because the acceptance had given the bill a credit to the indorsee. Subsequent to this was the case of *Price v. Neal*, already commented on, in which it was thought that the acceptor ought to be conclusively bound by his acceptance. The correctness of this doctrine was recognized by Mr. Justice *Buller*, in *Smith v. Chester*, 1 Durn. & East, 654, by Lord *Kenyon*, in *Barber v. Gingell*, 3 Esp. 60, where he extended it to an implied acceptance; and by Mr. Justice *Dampier*, in *Bass v. Clive*, 4 M. & S. 15, and it was acted upon by necessary implication by the Court, in *Smith v. Mercer*, 6 Taunt. 76. In *Levy v. The Bank of the United States*, 1 Binn. 27, already referred to, where a forged check, drawn upon the bank, had been accepted by the latter and carried to the credit of the plaintiff, and on the refusal of the bank afterwards to pay the amount, the suit was brought, the Court expressly held the plaintiff entitled to recover, upon the ground that the acceptance concluded the defendant. The case was very strong, for the fraud was discovered a few hours only after the receipt of the check, and immediate notice given. But this was not thought in the slightest degree to vary the legal result. "Some of the cases," said the Court, "decide that the acceptor is bound, because the acceptance gives a credit to the bill, &c. But the modern cases certainly notice another reason for his liability, which we think has much good sense in it; namely,

that the acceptor is presumed to know the drawer's handwriting, and by his acceptance to take this knowledge upon himself." After some research, we have not been able to find a single case, in which the general doctrine, thus asserted, has been shaken, or even doubted; and the diligence of the counsel for the defendants on the present occasion, has not been more successful than our own. Considering, then, as we do, that the doctrine is well-established, that the acceptor is bound to know the handwriting of the drawer, and cannot defend himself from payment by a subsequent discovery of the forgery, we are of opinion, that the present case falls directly within the same principle. We think the defendants were bound to know their own notes, and having once accepted the notes in question as their own, they are concluded by their act of adoption, and cannot be permitted to set up the defence of forgery against the plaintiffs.

It is not thought necessary to go into a consideration of other cases cited at the bar, to establish, that the acceptor may show that the accepted bill was void in its origin, as made in violation of the Stamp Act, &c.; for all these cases admit the genuineness of the notes, and turn upon questions of another nature, of public policy, and a violation of the laws of the land. Nor are the cases applicable, in which bills have been altered after they were drawn, or of forged indorsements, for these are not facts which an acceptor is presumed to know. Nor is it deemed material to consider in what cases receipts and stated accounts may be opened for surcharge and falsification. They depend upon other principles of general application. It is sufficient for us to declare that we place our judgment in the present case, upon the ground that the defendants were bound to know their own notes, and having received them without objection, they cannot now recall their assent. We think this doctrine founded on public policy and convenience; and that actual loss is not necessary to be proved, for potential loss may exist, and the law will always presume a possible loss in cases of this nature.

The remaining consideration is, whether there has been a legal waiver of the rights of the plaintiffs derived under the cash deposit, or, in other words, whether they have consented to treat it as a nullity. There is nothing on which to rest such a defence, unless it is to be inferred from the letter of Mr. Early, the cashier of the Bank of the United States, under date of the seventeenth of March, 1819, addressed to the cashier of the Bank of Hunts-

ville. That letter contains information of the forgery of the notes, and then proceeds; "by the person which we shall in a few days send to your place, as heretofore intimated, we will forward these altered bills for the purpose of getting you to exchange them for other money." Now, there is no evidence that this letter was ever shown to the Bank of Georgia, or its contents ever brought to the cognizance of its officers. It states no agreement to take back the notes, or to transmit them, on account of the Bank of the United States, to Huntsville. For aught that appears, the intention may have been to transmit them on account of the Bank of Georgia, under the expectation that the latter might desire it. But what is almost conclusive on this point is, that on the same day the Bank of Georgia had made a tender of the notes to the plaintiffs, which had been refused. This is wholly inconsistent with the notion that they had agreed to take them back, or to treat the previous credit as a nullity. Assuming, therefore, that the cashier had a general or special authority for the purpose of extinguishing the rights of the plaintiffs, growing out of the prior transactions (which is not established in proof), it is sufficient to say, that it is not shown that he exercised such an authority. And the case of *Levy v. The Bank of the United States* affords a very strong argument, that a waiver without some new consideration, upon a sudden disclosure, and under a mistake of legal rights, ought not to be conclusive to the prejudice of the party, where, upon farther reflection, he refuses to acquiesce in it. The subsequent letter of the twenty-fifth of March, demonstrates, that the intention of waiving the rights of the bank, if ever entertained, had been at that time entirely abandoned.

The letter from the Huntsville Bank, of the fourth of May, cannot vary the legal result. What might be the rights of the plaintiffs against that Bank, in case of an unsuccessful issue of the present cause, it is unnecessary to determine. The contract, whatever it may be, is *res inter alios acta*, from which the defendants cannot, and ought not to derive any advantage.

It only remains to add, that if the plaintiffs are entitled to recover the principal, they are entitled to interest from the time of instituting the suit.

Upon the whole, it is the opinion of the Court, that the Circuit Court erred in refusing the first and third instructions prayed for by the plaintiffs; and for these errors the judgment must be reversed, with directions to award a *venire facias de novo*. On the

second instruction asked by the plaintiffs, it is unnecessary to express any opinion.

Judgment reversed accordingly.

In *Mather v. Lord Maidstone*, 18 Com. B. 273, (1856) the question of forged acceptances is considered. *Jervis, C. J.*, in delivering the opinion of the Court, said: "I am of opinion that our judgment in this case must be for the plaintiff. As a general rule, the holder of a bill of exchange has a right to know whether or not it has been duly honored by the acceptor at maturity; and when the bill is presented, if the acceptor pays it, the money cannot be recovered back, if the acceptor has the means of satisfying himself of his liability to pay it, though it should turn out that the acceptance was a forgery. Can it make any difference that, instead of paying money for the bill, he takes the bill, examines it, and gives another acceptance in lieu of it? The replication in this case having been amended, the facts which appear upon the whole record are these: A bill of exchange was drawn by Villiers upon the defendant, and accepted by the defendant for the accommodation of Villiers, and indorsed by Villiers to Clark, and by Clark to the plaintiff; that bill was presented and dishonored, and notice of the dishonor duly given to Villiers and Clark, in order to preserve the holder's remedy over against them; the bill was subsequently offered to the defendant, who having had an opportunity of inspecting it, kept it, and gave the plaintiff a renewed bill at three months; and a month afterwards he discovered that the acceptance was not his signature, and that he was not liable, and he proposed to return the bill, having delayed the plaintiff of his remedy against the parties liable for thirty days. Under these circumstances, I apprehend the defendant could not be allowed to say that the acceptance was not his handwriting."

Mr. Justice Cresswell: "I am clearly of the same opinion. A man accepts a bill of exchange purporting to be drawn by one Thompson, and pays it, and it afterwards turned out to be a forgery; he cannot afterwards be permitted to say that he paid the money under a mistake. I apprehend the same result must follow if in lieu of money a fresh acceptance is given; and particularly where the party has retained the instrument in his hands so long as the defendant has done in this case." See *Beeman v. Duck*, 11 Mees. & W. 251; *Leach v. Buchanan*, 4 Esp. 226; *Cooper v. Le Blanc*, 2 Strange, 1051; *Barber v. Gingell*, 3 Esp. 60; *Hall v. Fuller*, 5 Barn. & C. 750; *Levy v. Bank of the United States*, 1 Binn. 27; and the recent case of *Stout v. Benoist*, 39 Mo. 277. See also *Morris v. Bethell*, Law Rep. 5 Com. P. 47, cited at length, *post*, p. 669.

But the acceptor does not warrant the genuineness of the signature of any party except that of the drawer; not even that of the payee indorsed before acceptance. See *Hortsmann v. Henshaw, ante*, 57, and note. If however the drawer puts a bill into circulation, bearing a forged indorsement of the payee, the former thus warrants such indorsement to be genuine; and the acceptor cannot, on discovering the forgery, recover the amount paid to a subsequent *bona fide* holder. He has paid the bill to the person to whom the drawer directed, and must look to the latter for indemnity. *Id.* See also *Meacher v. Fort*, 3 Hill, (S. C.) 227, cited in full in note to *Hortsmann v. Henshaw, ante*, 59.

And it has been held in one case that the rule that the acceptor admits the genuineness of the signature of the drawer must be taken strictly, and does not apply to a forgery in the body of the paper. *Bank of Commerce v. Union Bank*, 3 Comst. 230. But this may be doubted. See *Ward v. Allen*, 2 Met. 53; *Van Duzer v. Howe*, 21 N. Y. (7 Smith) 531; *Hall v. Fuller*, 5 Barn. & C. 750; *Langton v. Lazarus*, 5 Mees. & W. 629; *Chitty, Bills*, 428; *Byles, Bills*, 323; note to *Hortsmann v. Henshaw*, *ante*, 57.

An exception is made to the rule where the defendant becomes the holder of a forged draft before acceptance by the plaintiff, and before he had any knowledge of its existence, and when the loss had already attached; the acceptor giving notice of the forgery immediately upon discovering the same. In such case it has been held that the acceptor may recover the sum paid. *McKleroy v. Southern Bank of Kentucky*, 14 La. An. 458. In this case the opinion of the Court was delivered by

LAND, J. The evidence in this case establishes the following facts, viz: —

The plaintiffs were the factors of James Smith, a cotton planter, residing in the State of Arkansas. One John Zimmer, who had for a few months been a private tutor in Smith's family, assuming the name of John Belmont, forged a draft on the plaintiffs, in the name of Smith, as follows: —

\$986.

“HOMESTEAD, Nov. 5th, 1857.

“On the 15th December, 1857, pay to the order of John Belmont nine hundred and eighty-six dollars, value received, and charge the same to the account of

JAS. SMITH.

“To Messrs. McKleroy and Bradford, New Orleans, La.”

Zimmer also forged a letter of introduction, in the name of Smith, to Shotwell and Son, of Louisville, Kentucky, as follows: —

“HOMESTEAD, Nov. 5th, 1857.

“Messrs. Shotwell and Son.

“Gentlemen, — I introduce to you Mr. John Belmont, a gentleman who resided in my family as our tutor. Having been sick, he is now travelling to improve his health. I gave him a draft on McKleroy and Bradford, my commission house in New Orleans, which he is desirous to get cashed in your city. If you can give Mr. Belmont any assistance, by perhaps recommending my draft, as Mr. Belmont is a stranger in your city, and not yet fully recovered, you will greatly oblige me.

I am, gentlemen, yours respectfully,

“JAMES SMITH.”

The house of Shotwell and Son had been in correspondence with James Smith for about twelve years; and being deceived by the forger, indorsed the draft for the purpose of enabling the holder to negotiate it. The draft bearing the indorsements of John Belmont and of Shotwell and Son, was presented for discount at the Branch of the Southern Bank of Kentucky, and being considered good, was purchased by the bank. The draft was remitted to the Louisiana State Bank, with the following additional indorsement upon it — “Pay to R. J. Palfrey, cashier, J. B. Alexander, cashier.” The draft thus indorsed, was presented to plaintiffs for acceptance by the Louisiana State Bank, and was accepted on the last of November, or first of December, and was paid at maturity, on the 18th December, 1857, by the plaintiffs to the agent of the Southern Bank of Ken-

tucky. In January, 1858, James Smith, being in the city, made known to the plaintiffs, upon an examination of his account with them, that the draft was a forgery. Mr. Shotwell, of the house of Shotwell and Son, was in this city at the time, and was immediately sent for, and the fact of forgery communicated to him. On the 9th January, 1858, the plaintiffs gave formal notice by letter, of the forgery, to A. L. Shotwell and Son, to the Southern Bank of Kentucky, and also the Louisiana State Bank.

This suit was instituted by the plaintiffs to recover back the money paid on the draft, on the ground of payment in error.

There was judgment for the defendant, and the plaintiffs have appealed.

The district judge held, that the acceptance of a bill of exchange admits the genuineness of the drawer's signature, and that where an acceptor has paid to a *bona fide* holder of a forged draft or bill, having no notice of the forgery, he cannot recover back the money paid, although the forgery is established by the most conclusive evidence. And where one of two innocent persons must suffer, he who has misled the other, or has omitted his duty, must bear the loss.

These principles of law are well established, and admit, perhaps, of neither doubt nor controversy, and if applicable to this case, must determine the rights of the parties.

The defendant became the holder of the draft, before it was accepted by the plaintiffs, and before they had any knowledge of its existence, and consequently, before the defendant had any right of action against them for its recovery. The plaintiffs, therefore, had done no act which induced the defendant to believe the signature of the drawer to be genuine, at the time the bill was purchased. How, then, can it be said that the defendant purchased the bill on the faith of the plaintiffs' acceptance, or on their guarantee of the genuineness of the drawer's signature? Or how can it be said that the plaintiffs misled the defendant at the time of the purchase of the bill, or was then guilty of the omission of any duty toward the defendant as the purchaser of the bill?

If the defendant had purchased the bill on the faith of the acceptance of plaintiffs, or had sustained any loss in consequence of their negligence, we would have no difficulty in affirming the judgment of the lower court; but such are not the facts made known to us by the record.

The defendant purchased the bill on the faith of the indorsement of Shotwell and Son, which was a warranty of the genuineness of the drawer's signature to the bank; and there is no good reason, why the accidental payment made by the plaintiffs should inure to the benefit of the defendant.

Mr. Chitty says on this subject, "If he [the holder] thought fit to rely on the bare representation of the party from whom he took it [the bill], there is no reason that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when, by an immediate notice of the forgery, he is enabled to proceed against all other parties, precisely the same as if the payment had not been made, and consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems that, of late, upon questions of this nature, these latter considerations have influenced the Court in determining whether or not the money shall be recoverable back; and it will be found, on examining the older cases, that there were facts affording a distinction, and that upon attempt-

ing to reconcile them, they are not so contradictory as might on first view have been supposed." Chitty, Bills, 464.

The facts in this case afford the distinction to which Mr. Chitty refers, and take the case out of the general rule, which prevents the acceptor of a bill of exchange from recovering back the money paid in cases of forgery of the drawer's signature.

The loss had already attached, before the bill was either accepted or paid, and the acceptors gave immediate notice to the defendant, and Shotwell and Son, after ascertaining for the first time, from James Smith, in whose name the bill was drawn, the fact of forgery.

The evidence shows that plaintiffs accepted the bill, in the language of the witness, "chiefly through the respectability of the channels through which it came." It is, therefore, difficult to conceive upon what principle of equity or right the defendant can be permitted to retain the money paid in error by the plaintiffs, upon the facts of this case. No authority applicable to the particular circumstances of this case has been cited by the defendant's counsel, and we have no hesitation in reversing the judgment upon the authority of Mr. Chitty, above quoted.

In a case like the present, the acceptor is not estopped from proving the forgery of the bill.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the lower court be avoided and reversed; and it is now ordered, adjudged, and decreed, that the plaintiffs do have and recover of the defendant the sum of nine hundred and eighty-six dollars, with five per cent per annum interest, from the eighteenth day of December, 1857, with costs in both Courts.

A case (*National Bank of North America v. Bangs*) is now pending in the Supreme Court of Massachusetts, as we are informed by counsel, presenting facts somewhat similar to those in *McKleroy v. Southern Bank of Kentucky*, *supra*; and which the plaintiff will endeavor to bring within the rule in that case.

Though the general rule is that the drawee by acceptance admits the genuineness of the drawer's signature, or, more strictly speaking, is precluded from alleging that the drawer's signature has been forged, still it seems that in sound reason the doctrine should be restricted to the case of an action against an innocent indorsee; and that it should not apply in a suit against the payee of an unnegotiable or unindorsed bill, who has received money from the acceptor under a forgery of the name of the drawer. The reason why the acceptor is precluded from recovering against an innocent indorsee is that the latter has honestly paid value for the bill, and that it would be an unjust loss to require him to refund; it would be a loss, because he had parted with his money in taking the bill; it would be unjust, because the inducement to take the bill may have been, and usually is, the very fact of acceptance and confidence in the acceptor. See *Bank of St. Albans v. Farmers' & Mechanics' Bank*, 10 Vt. 141. But no such reason exists where the acceptor seeks to recover from the payee. The payee can be no loser by refunding money paid under a forgery of the drawer's signature. His debt against the one whose name was forged as drawer, if the latter owed the payee any thing, would remain; it could not be paid by a forgery. He could still recover it, whether he refunded to the acceptor or not. So not being involved in

any loss by being required to refund, it would be great injustice to the acceptor to allow the payee to retain the money.

The recent case of *National Park Bank v. Ninth National Bank*, 55 Barb. 87, is one of much importance. It is there held, Mr. Justice *Sutherland*, dissenting, that where the drawee of a bill, containing a forgery of the drawer's name, and also an alteration of the sum payable and of the name of the payee, has paid the same to a *bona fide* holder, he may recover the excess paid above the amount originally inserted in the bill. This alteration of the amount of the draft was held by a majority of the Court to constitute an exception to the general rule that the drawee must bear the loss when he pays a forged draft. See *Bank of Commerce v. Union Bank*, 3 Comst. 230; *Goddard v. Merchants' Bank*, 4 Comst. 147; *Worrall v. Gheen*, 39 Penn. State, 388; *Bruce v. Bruce*, 5 Taunt. 495; *Hall v. Fuller*, 5 Barn. & C. 750; *Young v. Grote*, 4 Bing. 253; *Pagan v. Wylie*, Ross, *Leading Cas. Bills and Notes*, 194; *Graham v. Gillespie*, ib. 195; *Wilkinson v. Johnson*, 3 Barn & C. 428.

Another exception has been made in Ohio, where either by express agreement, or a settled course of business between the parties, or by a general custom in the place, and applicable to the business in which both parties are engaged, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud: and by his negligent failure to perform it, has contributed to induce the drawee to act upon the paper as genuine, and to advance the money upon it. It is also held to be an exception to the rule, if the parties are in mutual fault, or where the money is paid upon a mistake of facts in respect to which both were bound to inquire. *Ellis v. Ohio Life Insurance Co.*, 4 Ohio State, 628, per *Ranney, J.* See *Goddard v. Merchants' Bank*, 4 Comst. 147; *Irving Bank v. Wetherald*, 36 N. Y. 335.

If a bill of exchange, payable to order, be accepted payable at the acceptor's bankers, and the indorsement of the payee be forged, and the bankers pay the bill to a party presenting it for payment, they are guilty of no breach of duty towards the acceptor in making the payment; but they cannot charge the amount of the bill in account against him, though the payee be a stranger to them, and they have no immediate means of ascertaining the genuineness of his signature, and have dealt with the bill in the ordinary course of business. *Robarts v. Tucker*, 4 Eng. Law & E. 236, in the Exchequer Chamber. Per *Maule, J.*, in the course of the argument: "I conceive that if a bill were presented to a banker by a stranger, with an indorsement on it of a person necessary to make out the title, but unknown to the banker, the banker would be justified in refusing to pay at once." Per *Parke, B.*, upon the same point: "Probably in such a case the obligation would be to pay in a reasonable time."

The question of negligence on the part of the drawer arose in the recent case of *Belknap v. National Bank of North America*, 100 Mass. 376. The case is one of great interest, and we give the full report of it. It was

Contract to recover \$701.49 deposited by the plaintiffs with the defendants. Answer, that the defendants duly paid upon checks of the plaintiffs the amount sued for.

At the trial in the Superior Court before *Morton, J.*, it was not disputed that the defendants paid the amount on two checks, signed by the plaintiffs, the first

of which was in form substantially as follows; and the second precisely resembled it, except in the name of the payee (Edward Williams), the number of the check (10,982), and the amount thereof (\$371.86) : —

" Lyman Belknap & Co., "
[Internal Revenue Stamp.]

" The National Bank of North America.

\$[329.63.]

Boston, [June 12,] 1867.

Pay to [Alfred Boyden or bearer] ~~or order~~ [Three Hundred Twenty-Nine]
Dollars, [Sixty-Three] Cents.

No. [10,980]

[Lyman Belknap & Co."]

Each check was filled out upon a lithographed blank, and those portions which were written by hand in ink are designated by being inclosed within brackets in the foregoing copy. Across the lithographed words " or order " in each check was drawn a broad line with a lead pencil.

The only question raised was, whether the defendants were justified in making payments on these checks; and there was evidence tending to show facts as follows : —

One of the plaintiffs signed six such lithographed blanks, on June 13, 1867, and left them in charge of Wilde, the plaintiffs' book-keeper, to be filled up and sent by mail to parties living at a distance, in settlement of accounts due from the firm. Wilde handed them, together with the six statements of account, to Bryant, a clerk twenty-one years old, who had come into the plaintiffs' employment on June 10; and directed Bryant to fill them out to correspond in date and amounts with the accounts, and make them payable to the respective orders of the parties to whom they were intended to be sent. Bryant filled them out accordingly, and returned all the papers to Wilde, who examined the checks, compared them with the accounts, found them correctly drawn, placed internal revenue stamps upon them, which he cancelled with the initials of the firm and the date, and then put them, with the accounts, into envelopes, which he addressed to the respective payees, sealed and delivered to Bryant, near evening, to take to the post-office.

The plaintiffs, who were commission merchants, had kept a bank account with the defendants for six or seven years, and drew on the defendants, and mailed to their consignors, as many as two or three thousand checks each year, using always the same lithographed form, and invariably drawing them payable to order, for the purpose of procuring receipts upon them. In drawing money for their own use, or to pay notes, the plaintiffs frequently drew checks payable to " notes payable or order," but in all such cases some one of the plaintiffs personally, or their book-keeper, received the money from the bank.

All of the six checks but the two in question were returned to the plaintiffs in due course of business, indorsed by the parties to whom they were mailed. The payees of these two, within a few days after June 14, gave notice to the defendants that they had not received the remittances due to them on their accounts; whereupon the plaintiffs went to the defendants' bank and there found the two checks, altered by the insertion, in ink, in Bryant's handwriting, of the words " or bearer " after the names of Boyden and Williams, and by the cancellation of the words " or order " by the line drawn by lead pencil; and the teller of the

bank, being then asked, could not tell to whom he had paid these two checks, or either of them. Bryant came to the plaintiffs' place of business early on the morning of June 14, and about ten o'clock went away "to be gone for an hour or two," and never came back.

Much evidence, which, by the decision of this Court, has become immaterial, was introduced on the question whether the defendant's teller used due care in paying the two checks.

On the whole case, the plaintiffs requested the judge to rule as follows: 1. "That, if the checks were altered by erasing the words 'or order' and inserting the words 'or bearer,' after they were executed by the plaintiffs, and without authority from them, the checks were void, and the defendants could not set up a payment under them to defeat the plaintiffs' claim, unless the plaintiffs were guilty of negligence with respect to them.

2. "That, if the checks were altered by erasing the words 'or order,' and inserting the words 'or bearer,' and the alteration was apparent on the face of the instruments, it was the duty of the defendants, before paying the checks, to ascertain whether the alterations were authorized; otherwise they would run the risk of their being unauthorized.

3. "That, if the checks were taken from the letters in which they were inclosed, and the alterations were made with a fraudulent purpose, after the execution of the checks, by a clerk of the plaintiffs, who was merely employed and authorized to take the letters containing the checks to the post-office, the plaintiffs were not responsible for his fraudulent acts, although he may have been employed to fill in the body of the checks under the direction of the book-keeper who had charge of the filling in of the checks.

4. "That, if the checks were altered by cancelling the words 'or order,' and inserting the words 'or bearer,' without the authority of the plaintiffs, and after the plaintiffs had signed the checks, such alteration was a forgery, and the bank paid the checks at its own risk."

The judge declined so to rule; and instructed the jury "that, if the words 'or bearer' were written in the checks before they were sent out by the plaintiffs' book-keeper, the bank was justified in paying the checks; but if the words 'or bearer' were inserted after the checks were issued, it did not necessarily follow that the plaintiffs would not be held on the checks; that if the checks were signed in blank by the plaintiffs, and given to Wilde to be filled up, and he delivered them to Bryant, and directed him to fill them up, and they were filled up by him, leaving a blank space after the names of the payees and before the printed words 'or order,' and they were then issued in that form, and he, Bryant, afterwards inserted in the blank space the words 'or bearer,' in the same handwriting as the rest of the written part of the checks, and if the jury should find there was nothing in the appearance of the checks, when presented to the teller for payment, to excite any suspicion, or which ought to have excited any suspicion on his part, or to indicate that the checks had been altered after they were issued, and he exercised due care in paying them, then the bank would be protected in making the payment; that, as matter of law, the mere fact of the printed words 'or order' having been erased, the words 'or bearer' being in the checks, would not in itself alone be such a suspicious circumstance as would deprive the bank of this defence, but that that fact, with the other facts in the

case, might show want of due care on the part of the teller;" and the jury were instructed on this point "to take into consideration the fact of the erasure of the words 'or order' and all the other facts in the case, and if, upon all the facts, there was any thing suspicious in the appearance of the checks when presented for payment, or which ought to have excited suspicion, or if the teller did not exercise due care, then the fact that the plaintiffs had been careless in respect to the checks would not relieve the defendants from liability; and further, that, if there was any thing suspicious in the appearance of the checks, or which ought to have excited suspicion, or if there was any want of due care on the part of the teller in paying the checks, then any practice, at the banks in Boston, to pay checks to persons presenting the same, if known to the teller, or identified by some person known to him, though there was such identification upon payment of the checks in question, would not protect the bank in paying the same."

The jury found for the defendants, and the plaintiffs alleged exceptions.

CHAPMAN, C. J. It appears that the plaintiffs signed several checks drawn upon the defendants, payable to [blank] or order, and left them with Wilde, their book-keeper, to be filled up and sent by mail to several parties living at a distance, for the payment of debts owed to them severally. Wilde handed these checks to Bryant, the clerk, to be filled up with the proper dates, names and amounts, leaving them payable to the order of the several creditors. Bryant did so, and then returned them to the book-keeper, who examined them, found them correct, stamped them, cancelled the stamps, placed them, with the accounts to be paid by them, in envelopes, sealed the envelopes, and addressed them to the proper persons.

It is not necessary to consider the question whether any part of the plaintiffs' conduct thus far was careless; for their confidence was not abused, but every thing had been properly done. The case is not different from what it would have been if he had given the blanks to the clerk to fill up before they signed them, and had signed them after they were filled up, stamped and returned to them.

The sealed letters were delivered to the clerk to carry to the post-office. We cannot assume, as is implied in the instructions, that it was careless on the part of the plaintiffs to send sealed letters to the post-office by a clerk, although the clerk knew their contents. For he could not obtain access to the contents without committing a crime. The checks were not intrusted to him as in the cases of *Putnam v. Sullivan*, 4 Mass. 45, or *Young v. Grote*, 4 Bing. 253.

He obtained possession of the checks surreptitiously; and, by the erasure of the words "or order," and inserting the words "or bearer," he committed a forgery; for it was a fraudulent alteration of the instruments in a material part, whereby a new operation was given to them. Before the alteration, the checks could only be paid to the creditor or his order, and such payment would discharge the debt which each check was designed to pay. After the alteration, each check was payable to any one who should present it. Such an alteration would vitiate the instruments, even in the hands of a *bona fide* holder for value. *Wade v. Withington*, 1 Allen, 561. The case was presented to the jury upon the question of the diligence or fault of the defendants, and the Court are of opinion that this was an erroneous view of it.

Exceptions sustained.

"When an innocent holder of negotiable paper parts with it by delivery, without indorsing it, in payment of a debt due, or then created, as, for example, in payment for goods then purchased, or by way of discount for money then loaned by a bank, banker, or individual, and the paper proves to have been forged, the debt or loan not being paid by it may be recovered. In such case there is a warranty implied by law that the paper is genuine, as there is that coin or bank-notes used for like purposes are genuine. Per *Shepley*, C. J., in *Baxter v. Duren*, 29 Me. (16 Shepl.) 434, 440 (1849), citing *Jones v. Ryde*, 5 Taunt. 488; *Fuller v. Smith*, 1 Car. & P. 197; *Camidge v. Allenby*, 6 Barn. & C. 373; *Coolidge v. Brigham*, 1 Met. 547.

"When no debt is due or created at the time, and the [forged] paper is sold as other goods and effects are, the purchaser cannot recover from the seller the purchase-money. There is in such case no implied warranty of the genuineness of the paper. The law respecting the sale of goods is applicable. The only implied warranty is that the seller owns or is lawfully entitled to dispose of the paper or goods." Id., citing *Bank of England v. Newman*, 1 Ld. Raym. 412; *Fenn v. Harrison*, 3 T. R. 757; *Fyddell v. Clark*, 1 Esp. 447; *Emly v. Lye*, 15 East, 6; *Ex parte Shuttleworth*, 3 Ves. 368; *Ex parte Blackburne*, 10 Ves. 204; *Ellis v. Wild*, 6 Mass. 321.

The learned chief justice says that the cases upon this subject are in apparent, but not real conflict; and that "the principal difficulty appears to have been experienced in coming to a conclusion whether the paper when discounted or sold was received in payment of a debt or loan due or then created, or taken by way of purchase and sale." He proceeds to say: "The use of the word 'discount' in two different senses, has also contributed to introduce obscurity; it being used in some of the cases, and by some judges, to designate the reception of paper in payment of a loan or debt, and in other cases, and by other judges, in the sense in which it appears to have been used by the broker in this case, to designate the reception of it on a sale as a piece of property."

But the editor of *Story, Promissory Notes*, § 118, says that the distinction above drawn may well be doubted, both on principle and authority; citing *Rieman v. Fisher*, 4 Am. Law Reg. 433, in which the doctrine of *Baxter v. Duren* is directly denied. *Rieman v. Fisher* takes the broad ground that a public bill-broker who sells commercial paper impliedly warrants the genuineness of the signatures and indorsements; and that if the paper should prove to be forged, the loss must fall upon the vendor. And this is the doctrine of the English Courts, and seems to be the better rule. See *Gurney v. Womersley*, 4 Ellis & B. 133, decided in 1854. See also *Cabot Bank v. Morton*, 4 Gray, 156, per *Shaw*, C. J.; *Merriam v. Wolcott*, 3 Allen, 258; *Canal Bank v. Bank of Albany*, *ante*, p. 643.

The question of estoppel by payment of a forged bill has arisen in several instances. The most recent case is that of *Morris v. Bethell*, Law Rep. 5 Com. P. 47, decided in 1869. This was an action by the holder against the defendant as the acceptor of a bill. The case was this: In August, 1867, the defendant paid a bill of exchange, of which the plaintiff was the holder, upon which the defendant's name had been written as acceptor without his authority. In an action against him upon another bill similarly accepted, the jury found that the acceptance was not the defendant's signature, or written with his authority; that

the forged signature was not adopted by the defendant; that the defendant did not know that the plaintiff was the holder of the former bill; and that he did not lead the plaintiff to believe that the acceptance written on the bill sued upon was his. The Court unanimously held that the fact that the defendant had paid the bill in August, above mentioned, did not estop him from denying that the bill declared on was accepted by him or with his authority; that the circumstances were properly submitted to the jury; and that the judge was not bound to tell them that, as matter of law, the plaintiff was entitled to recover. The Court distinguished the case from *Barber v. Gingell*, 3 Esp. 60. *Borill, C. J.*, said: "If it were made to appear that there had been a regular course of mercantile business, in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of the principal, there would be evidence, and almost conclusive evidence, against the latter, that the acceptance was written by his authority. That was the case of *Barber v. Gingell*. It would have been idle to contend there that the defendant was not responsible for the signature." See also *Beeman v. Duck*, 11 Mees. & W. 251; *Mather v. Lord Maidstone*, cited at length, *ante*, p. 661.

LOST BILLS AND NOTES.

[As to stolen paper, see *Goodman v. Simonds*, *ante*, 239, and note.]

PINTARD v. TACKINGTON.

(10 Johnson, 104. Supreme Court of New York, January, 1813.)

When owner may recover. — The plaintiff declared on a promissory note, payable on demand, and stated that the note had been lost or destroyed; and the existence and contents of the note being proved, and it not appearing that the note was negotiable, or if negotiable, that it had been negotiated, *held*, that the plaintiff was entitled to recover.

IN error, on *certiorari*, from the justices' court of the city of New York. Tackington brought an action in the Court below, against Pintard, and declared for money had and received by the defendant to the use of the plaintiff; and also that the defendant, in May, 1811, being indebted to him, for work and labor to the amount of \$62, gave his note to the plaintiff, for that amount payable on demand; that the plaintiff put the note in his chest on board of the vessel of the defendant, and that the defendant sailed out of the port, with the plaintiff's chest on board containing his clothes and the note, leaving the plaintiff behind.

A witness for the plaintiff testified, that after the return of the defendant to New York, in the vessel, which was about three months after the trunk was put on board, he applied as attorney of the plaintiff, for the note, to the defendant, who said he did not know where it was, but supposed it was in the plaintiff's chest, in the fore part of the vessel. but that he could not then get at the chest, and that the witness must call again; that he called again, and on opening and examining the chest the note could not be found. The defendant admitted that he had given such a note to the plaintiff. Another witness testified that she saw the plaintiff, (who was a sailor), put the note into the chest, which was put on board of the defendant's vessel.

The Court below, being of opinion that there was sufficient evidence of the loss of the note, and of the existence of a debt due from the defendant to the plaintiff, for which the note was given, gave judgment for \$50, being the extent of their jurisdiction.

*Per Curiam.*¹ The declaration of the plaintiff below consisting of a detail of his case, is to be liberally construed so as, if possible, to meet and embrace the proof. We have never required any technical nicety or form in pleadings, in the justices' courts, because the pleadings are usually by parol, and managed by the parties, without the aid of counsel. The plaintiff, therefore, declared for money had and received, and upon a lost note, which he particularly described, and as having been given for work and labor. If, therefore, the testimony will entitle him to recover, either upon the note, by proving its existence, loss and contents, or upon the original debt, for work and labor, the judgment ought to be supported. We see no reason why the recovery upon the note, as a lost note, was not good. It does not appear that the note was negotiable, or, if negotiable, that it had ever been indorsed, and the existence and contents of the note were fully proved, and the circumstances were enough to authorize a conclusion that it had been lost or destroyed. The cases which have not permitted a recovery at law, upon negotiable paper which was merely lost and not destroyed, were those in which the paper had been indorsed before it was lost. *Pierson v. Hutchinson*, 2 Camp. N. P. 211, and note; and the cases cited by Lord *Eldon* in 6 Ves. 812. The Court below went, perhaps, upon the ground of the existence of the previous debt; and that the recovery upon that was to be supported, notwithstanding the giving of the note. The better opinion on this point seems to be, that the acceptance of negotiable paper, on account of a prior debt, is *prima facie* evidence of satisfaction, and that you cannot recover upon the old debt without some explanation, or giving some account of the note. *Kearslake v. Morgan*, 5 T. R. 515; *Richardson v. Rikeman*, cited in 5 T. R. 517; *Holmes and Drake v. D'Camp*, 1 Johns. 34. But this was not shown to be negotiable paper, and if that was the intentment, in the first instance, as seems to have been the conclusion of the Court in *Angel v. Felton*, 8 Johns. 149, yet the plaintiff below gave as sufficient an account as the nature of the case, and

¹ KENT, C. J., THOMPSON, SPENCER, VAN NESS, and YATES, JJ.

the condition of the parties would well admit, of the loss of the note, without its being negotiated and indorsed. On either ground therefore, we think the judgment ought to be supported.

Judgment affirmed.

There is no conflict upon this subject. See Story, Promissory Notes, § 151, and authorities cited. But in respect to paper negotiable and negotiated, the cases are not in harmony. See Rowley v. Ball, *post*, 680, and cases following.

Even in the case of destruction of negotiable paper, the plaintiff will not be allowed to recover, if he voluntarily destroyed it himself. Vanauken v. Hornbeck, 2 Green (N. J.) 178; Fisher v. Mershon, 3 Bibb, 527; Blade v. Noland, 12 Wend. 173. Mr. Justice *Nelson*, in this last-named case, said: "I concede the rule insisted on by the counsel for the plaintiff below to the fullest extent borne out by the authorities, and they are numerous; and still am of opinion that the plaintiff did not give such proof of the loss of the note to justify the secondary proof of its contents, or to entitle him to resort to the original consideration. If there had been satisfactory proof of the loss or destruction of the note, the omission to give a bond of indemnity under the statute (2 Rev. Sts. 406, §§ 75, 76), would not have interfered with the recovery; for the provision of the statute on this subject is limited to *negotiable paper*. There is no evidence that the note in question was negotiable, and it seems to be settled that the Court will not *presume* a lost note to be negotiable. 10 Johns. 104; 3 Wend. 344.

"The proof is, that the plaintiff deliberately and voluntarily destroyed the note before it fell due; and there is nothing in the case accounting for or affording any explanation of the act, consistent with an honest or justifiable purpose. Such explanation the plaintiff was bound to give affirmatively, for it would be in violation of all the principles upon which inferior and secondary evidence is tolerated, to allow a party the benefit of it, who has wilfully destroyed the higher and better testimony. The danger of this very abuse of a relaxation of the general rule greatly retarded its introduction into the law of evidence, and it was for a long time confined to a few extreme cases, such as burning of houses, robbing, or some unavoidable accident. It was contended by Chancellor *Lansing*, in the case of Livingston v. Rogers, 2 Johns. Cas. 488, after an examination of all the leading cases on the subject, that secondary evidence was not admissible to prove the contents of a paper, where the original had been lost by the *negligence* or *laches* of the party or his attorney. He failed to convince the Court of Errors to adopt his views in a case where the negligence was not so great as to create suspicion of design. Further than this I could not consent to extend the rule. I have examined all the cases decided in this Court where this evidence has been admitted, and in all of them the original deed or writing was lost, or destroyed by time, mistake, or accident, or was in the hands of the adverse party. Where there was evidence of the actual destruction of it, the act was shown to have taken place under circumstances that repelled all inference of a fraudulent design. 2 Johns. Cas. 388; 2 Caines, 363; 10 Johns. 363, 374; 11 *id.* 446; 8 *id.* 149; 3 Cow. 303; 8 *id.* 77; 3 Wend. 344; Peake's Ev. 972. Am. ed.; 10 Co. 88; Leyfield's Case; 3 T. R. 151; 8 East, 288, 289; Gilb. Ev. 97.

"In Leyfield's Case, Lord Coke gives the obvious reasons why the deed or

instrument in writing should be produced in Court. 1. To enable the Court to give a right construction to it from the words; 2. To see that there are no material erasures or interlineations; 3. That any condition, limitation, or power of revocation may be seen; for these reasons oyer is required in pleading a deed. But he says in great and notorious extremities, as by casualty by fire, &c., if it shall appear to the judges that the paper is burnt, it may be proved by witnesses so as not to add affliction to affliction.

“The above is in brief the foundation of the rule in these cases of secondary proof of instruments in writing, and it has been much relaxed and extended in modern times from necessity, and to prevent a failure of justice; yet I believe no case is to be found where, if a party has deliberately destroyed the higher evidence without explanation showing affirmatively that the act was done with pure motives, and repelling every suspicion of a fraudulent design, that he has had the benefit of it. To extend it to such a case would be to lose sight of all the reasons upon which the rule is founded, and to establish a dangerous precedent. We know of no honest purpose for which a party, without any mistake or misapprehension, would deliberately destroy the evidence of an existing debt; and we will not presume one.

“From the necessity and hardship of the case, courts have allowed the party to be a competent witness to prove the loss or destruction of papers; but it would be an unreasonable indulgence, and a violation of the just maxim, that no one shall take advantage of his own wrong to permit this testimony, where he has designedly destroyed it.

“*Judgment reversed.*”

See also *Bank of Louisville v. Summers*, 14 B. Mon. 306; *Wade v. New Orleans Canal, &c., Co.*, 8 Rob. La. 140; *Des Arts v. Leggett*, 16 N. Y. (2 Smith), 582; s. c., 5 Duer, 156; *McGarr v. Lloyd*, 3 Penn. State, 474; *Tower v. Appleton Bank*, *infra*, 674, and note.

As to the presumption respecting negotiability, see *Dean v. Speakman*, 7 Blackf. 317; *Chaudron v. Hunt*, 3 Stew. 31; *Hough v. Barton*, 20 Vt. 455.

THOMAS T. TOWER v. THE PRESIDENT, DIRECTORS, &c., OF THE APPLETON BANK.

(3 Allen, 387. Supreme Court of Massachusetts, January, 1862.)

Bank-bills. Circumstantial evidence of destruction. — The owner of bank-bills which cannot be identified or distinguished from other similar bills, cannot maintain an action against the bank which issued them, upon circumstantial evidence that they have been destroyed, and a tender of indemnity.

CONTRACT against a banking corporation, to recover the amount of sundry bank-bills issued by it, and alleged to have been destroyed by fire.

At the trial in the Superior Court, there was evidence tending to show that the plaintiff left the bills in question in his trunk, in his room in a house in Chicago, which was burnt within an hour afterwards, and that no person entered the room after he left it, and that the trunk and its contents were burnt with the house. There was no other evidence of the destruction of the bills. Upon this, and other evidence which is not necessary to be stated here, *Putnam, J.*, instructed the jury that if the plaintiff was the owner of the bills, and they were destroyed by fire, and the plaintiff notified the defendants and demanded the amount thereof, and tendered a bond of indemnity, he was entitled to recover; and the jury returned a verdict for the plaintiff. The defendants alleged exceptions.

HOAR, J. The reasons upon which it has been held that the owner of a negotiable promissory note, which is lost or destroyed, may maintain an action upon it against the maker, although it may have been indorsed in blank, and therefore made transferable by delivery, were stated in the case of *Fales v. Russell*, 16 Pick. 315.¹ The general doctrine is, that where a writing is evidence of a contract, the loss or destruction of the writing does not destroy the cause of action, and that secondary evidence of the contract is admissible. The objection to the application of this doctrine to the case of a negotiable bill or note, payable to bearer, or payable to order and indorsed in blank, is given in *Hansard v. Robinson*, 7 Barn. & C. 90. Lord *Tenterden* there says: "The general rule of the English law does not allow a suit by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes, in this case, an exception to the general rule. What, then, is the custom in this respect? It is, that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill. The acceptor, paying the bill, has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer or retain his money?" This was the case of an indorsee against the acceptor of a lost bill of exchange; and the judgment of the Court was, that the plaintiff's only remedy was

¹ *Post*, 683.

in equity, where the Court could provide for an adequate indemnity to the defendant, as a condition of payment. And such has been the rule in England, in the case of lost notes, until it was modified by statute. The statute of 9 & 10 W. 3, c. 17, § 3, provided in the case of inland bills expressed to be for value received, and payable after date, "that in case any such inland bill or bills of exchange shall happen to be lost or miscarried within the time before limited for payment of the same, then the drawer of the said bill or bills is and shall be obliged to give another bill of the same tenor with those first given; the person or persons to whom they are and shall be so delivered giving security, if demanded, to the said drawer, to indemnify him," &c. The statute of 17 & 18 Vict. c. 125, § 87, contains the more extensive provision, that "in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court or judge, or a master, against the claims of any other person upon such negotiable instrument."

But without any statute provision, the case of *Fales v. Russell* is an authority to show that in this Commonwealth the plaintiff, in the case of a note lost or destroyed, will not be required to resort to a court of chancery for a remedy; but that a court of law, while it fully recognizes the right of the defendant to the security which the production and giving up of the negotiable instrument declared on would afford, has authority to prescribe an equivalent security, by a sufficient and reasonable indemnity. *Almy v. Reed*, 10 Cush. 421. It has been held otherwise in New York. *Rowley v. Ball*, 3 Cow. 303.¹

Whether the same rule is applicable to bank-notes, intended to circulate, and actually circulated as currency, is the question presented by the case at bar; and we believe it has never been decided in this Commonwealth. Although a bank-note is the promissory note of a corporation, it differs in some important respects from other promissory notes. It is intended not merely as the evidence of a single contract, to become worthless when that contract is performed, but to be issued repeatedly, and to pass from hand to hand with the utmost freedom. They are commonly made upon paper of a peculiar quality, embellished and distinguished by vignettes and other ornamental engraving; and are of some value

¹ *Post*, 680.

to the bank which issues them. In *The People v. Wiley*, 3 Hill (N. Y.), 194, it was held that bank-notes prepared for issue, but still in the possession of the bank, were the subject of larceny. It was said by Mr. Justice *Wilde*, in *Hinsdale v. Larned*, 16 Mass. 68, that "there can be no great doubt that the statute of limitations is not applicable to demands on bank-notes, where the action is brought against the corporation; because the circulation of such notes is daily renewed; and because lapse of time is no presumption of payment, these notes never being paid, unless given up by the holder at the time of payment." This was so fixed by statute afterward. Rev. Sts. c. 120, § 4. Whether payment can be enforced without a previous demand at the bank, if no place of payment be stipulated in the note, is a question which we believe has never been determined in this Commonwealth. In Maine, it has been decided that they do not differ in this respect from other promissory notes payable on demand, and that the commencement of the action is a sufficient demand. *Bryant v. Damariscotta Bank*, 18 Me. 240. The same opinion was given in the Supreme Court of New York by *Woodworth, J.*, in *Bank of Niagara v. McCracken*, 18 Johns. 493; but in *Jefferson County Bank v. Chapman*, 19 Johns. 322, the same judge observed that this was only his individual opinion, and was not decided by the Court. In *Haxtun v. Bishop*, 3 Wend. 9, 21, Chief Justice *Savage* expressed the same opinion; but the point was not essential to the decision of the case.

Some implication that the legislature regard the right of a bank to the possession of its bills, as a condition of paying them, to be different from that of the maker of an ordinary promissory note, may perhaps be found in the provision in St. 1859, c. 116, § 1, "that banks may replevy their bills upon payment or tender of the amount due upon them." Gen. Sts. c. 57, § 65. And a similar inference might be drawn from the provision that banks shall be subject to a penalty for not paying bills presented at their banking-house in business hours; as if this were regarded as the breach of the contract with the bill holders. Gen. Sts. c. 57, § 59.

The case of *Hinsdale v. Bank of Orange*, 6 Wend. 378,¹ was an action to recover upon bank-notes which had been cut in two, for the purpose of transmission through the mail, and one-half of them lost. The plaintiff was allowed to recover, on the ground

¹ *Post*, 706.

that by severing the notes their negotiability was destroyed. But Mr. Justice *Marcy* took a distinction between the loss and the destruction of a note, and said: "If the owner of a bill loses it, he cannot recover; but if he can prove that it is actually destroyed, he may."

In *Bullet v. Bank of Pennsylvania*, 2 Wash. C. C. 172, a similar decision was given by Mr. Justice *Washington*; and again, upon a very full discussion, in *Martin v. Bank of United States*, 4 Wash. C. C. 253. In each of the two latter cases, no distinction is made between a bank-note and any other promissory note payable to bearer; but the general principle is asserted, first, that the note is only the evidence of the contract, the loss or destruction of which may be supplied by secondary evidence; and secondly, that, if upon any other ground than fraud or perjury the maker might be subject to be twice charged, the plaintiff should not be allowed to recover, except upon furnishing an adequate indemnity, which could only be provided by a court of equity.

But aside from any specific distinction applicable to all bank-bills issued as currency, there is a difficulty in the plaintiff's case as presented upon the facts reported. The evidence of the destruction of the bills is merely circumstantial, and not positive. Upon the doctrine of *Fales v. Russell*, the plaintiff, by his own negligence or misfortune, is unable to do what it was the right of the defendants to require, for their own security, namely, to give up the bills when paid. If the bills were shown to be actually destroyed, beyond all question or controversy, the case might be different; as, for instance, if the destruction were admitted by the pleadings. But upon the mere preponderance of proof, which is sufficient to authorize a jury to find a fact in issue, we think it is not to be assumed conclusively that the bills are destroyed, without further provision for the defendants' security against their reappearance. If, then, it is sought to provide this security by a bond of indemnity, how can such a bond be given? There is nothing to distinguish or identify the bills which the plaintiff says have been destroyed. Against a second payment of what bills are the defendants to be indemnified? How could they show that any bills already redeemed, or hereafter to be redeemed, were or were not the bills in question? Clearly there could be no mode of determining the fact, until their whole circulation of bills of the same denomination should be called in. But suppose that

several parties should sue upon bills alleged to have been destroyed, and should recover, each giving a bond of indemnity. If it should afterward appear that all the bills had not been destroyed, upon which bond would the defendants have a remedy?

The answer given to this objection by the plaintiff's counsel is, that the defendants issue bills in such form as they choose, and that the plaintiff should not be prejudiced because they are issued in such a form as not to be distinguished from each other. But this is not a satisfactory answer. The defendants have not contracted to redeem their bills, except upon their production and delivery; and it is the negligence or misfortune of the plaintiff that they cannot be produced. The plaintiff is then bound to furnish an equivalent; to put the defendants in as good a condition as if the bills were produced. If he cannot do this, he has no right to shift the consequences of the loss upon a party in no wise answerable for it. It is deserving of consideration, also, that the defendants do not stand upon any equality with the plaintiff in the trial of the question whether the bills are really destroyed. The plaintiff is a competent witness for himself; and the production by the defendants of any number of bills exactly like those said to be destroyed would be no defence, unless the whole issue of such bills were accounted for.

Upon the whole matter, the Court are of opinion that to permit a plaintiff to recover upon such proof as this case presents, upon bills circulating as currency, and available to any one taking them *bona fide*, without such means of distinguishing the particular bills as would admit of an adequate indemnity, would open a wide door to fraud, would be incompatible with the reasonable security and rights of the defendants, and is not required by law.

Exceptions sustained.

It was at one time thought in England that not even proof of destruction of a negotiable note or bill was sufficient ground for an action at law. *Hansard v. Robinson*, 7 Barn. & C. 90 (1827). And this doctrine has the sanction of Judge Story, *Promissory Notes*, § 449. But the opinion expressed in *Hansard v. Robinson* was only a *dictum*; and the more recent cases hold a different doctrine. See *Wright v. Maidstone*, 1 Kay & J. 701 (1855); *Blackie v. Pidding*, 6 Com. B. 196 (1848); *Woodford v. Whiteley*, Moody & M. 517 (1850). And it is now the accepted rule both in England and America, that an action is maintainable at law on a bill or note which has been destroyed without the volition of the holder. See *Clarke v. Quince*, 3 Dowl. 26; *Moore v. Fall*, 42 Me. 450; *Des*

Arts v. Leggett, 16 N. Y. (2 Smith), 582; Aborn v. Bosworth, 1 R. I. 401; Wade v. Wade, 12 Ill. 89; Thayer v. King, 15 Ohio, 242; Bank of the United States v. Sill, *post*, 699; Pintard v. Tackington, *ante*, 671 and note.

ROWLEY v. BALL.

(3 Cowen, 303. Supreme Court of New York, October, 1824.)

No action at law on lost negotiable note. — An action at law cannot be sustained on a negotiable promissory note payable to bearer, by the owner, on proof that the note was lost, though he show that it was lost after it became due.

When the owner may sue at law.

ERROR, from the Common Pleas of the county of Munroe. The cause was originally commenced by Rowley against Ball, before a justice of that county, who gave judgment against Ball, who appealed to the Common Pleas, where the cause was tried January 10th, 1822.

Rowley declared against Ball upon a promissory note given by the latter to one William Huxley, payable to him or bearer, for \$30, dated on or about the middle of June, 1819, and transferred to the plaintiff; and the declaration averred that the note had since been stolen, lost, or destroyed, or taken from the plaintiff without his consent or knowledge.

Plea, the general issue.

Upon the trial, J. D. Bailis testified, that he had seen a note in Rowley's possession, purporting to have been given by Ball, for \$30, dated some time in June, 1819. The precise time when it was payable he could not tell; but recollected that it was payable to William Huxley or bearer, and when he saw the note, which was in April, 1821, it was due. It was admitted by Rowley's counsel, that Ball could neither read or write, but signed by his mark; and that there was no subscribing witness to the note. Rowley, the appellee, swore that he put the note into his pocket-book, and sometime after made diligent search for it, both in his pocket-book and desk, but could not find it; that the note was either lost, stolen, or destroyed; that he had reason to believe that the note had been taken from his pocket-book, and given to Ball; for the story of his having lost the note came to him from Ball

before he knew or suspected the loss. On being cross-examined, he stated that it was first suggested to him that the note was lost by Samuel Darling, his own brother-in-law. Hiram Huxley swore that he came to Ball's in company with his brother, John Huxley, who told Ball that he had a note against him, which was given to William Huxley. Ball replied, that whoever held the notes must pay for keeping William Huxley's wife; but requested John Huxley to take a gun of him, and apply it on the notes; and it was agreed between them that John Huxley should take the gun upon trial, and, if he liked it, he should allow \$14 on the notes. If he did not like it, he was to return it. John Huxley testified that he received of William Huxley, two notes against Ball, in the State of Ohio, one for \$30, and one for \$20, as they were read to him; that he could neither read nor write: that he went to Ball's as stated by Hiram Huxley, in company with him, and told Ball that he had notes against him, which were given to William Huxley, one for \$30, and one for \$20, and he answered, that whoever held the notes must pay him for keeping William Huxley's wife. The witness requested Ball to pay him some money; but Ball said he could not. He then requested him to let the witness have some leather; but Ball answered that he had none to spare. The conversation then followed about the gun, as stated by Hiram Huxley. The witness took the gun, but afterwards returned it, and sold the \$30 note to one Clarke.

The counsel for Ball insisted, that he ought not to be put upon his defence, till Rowley had proved the actual destruction of the note. The counsel for Rowley insisted, that there was already sufficient evidence of the destruction of the note, or, at least, sufficient to entitle him to go to the jury, upon the ground that he had proved the loss of the note after it fell due. This was opposed by Ball's counsel; and,—

The judges gave their opinion, that the several matters proved and given in evidence, were not sufficient to entitle Rowley's counsel to go to the jury, inasmuch as an actual destruction of the note had not been proved: that Rowley could not recover on a negotiable note, although it was lost after it became due, unless this was followed by proof of its destruction; and gave judgment of nonsuit. To this opinion, Rowley's counsel excepted: and the cause came to this Court upon a bill of exceptions, containing the above matters.

WOODWORTH, J. No exception was taken to the proof given as to the execution of the note. Were it necessary, however, to express an opinion, I should consider the evidence *prima facie* sufficient. The witness stated to the defendant that he held two notes against him, given to William Huxley; one for \$30, the other for \$20. The defendant, in reply, admitted the notes, and offered to make part payment. The identity of the note to which the confession related is established with reasonable certainty. The case of *Shaver v. Ehle*, 16 Johns. 201, is clearly distinguishable from the present.

The remaining question is, whether an action at law can be sustained on a negotiable promissory note, payable to bearer, by a person who was the holder, on his proving that the note was lost.

If the note had not been negotiable, or, if negotiable, had not in fact, been negotiated, the plaintiff would be entitled to recover. *Pintard v. Tackington*, 10 Johns. 104.¹ The cases which have not permitted a recovery at law upon negotiable paper lost, but not destroyed, were those in which the paper had been indorsed before it was lost. *Pierson v. Hutchinson*, 2 Camp. 211; *Ex parte Greenway*, 6 Ves. 811. In this case, the note being payable to the bearer, the holder could make out, *prima facie*, a cause of action, and although the note was due at the time it was lost, the maker would be exposed to the hazard of showing that fact by legal evidence. It would, therefore, seem to be a hard doctrine, which should place the maker in this situation, without requiring an indemnity. In such cases, it is better to leave the party to his remedy in equity, where a suitable indemnity will be provided against any subsequent recovery. This subject peculiarly belongs to equity jurisdiction. In *Ex parte Greenway*, Lord *Eldon* observes: "I never could understand by what authority courts of law compelled parties to take the indemnity." In *Pierson v. Hutchinson*, Lord *Ellenborough* held, that whether an indemnity be sufficient or insufficient, is a question of which a court of law cannot judge; and although there are *dicta*, that, upon the offer of an indemnity, the indorsee of a lost bill may recover at law, they are so contrary to the principles upon which the judicial system rests, he could not venture to proceed upon them. Chitty, in his *Treatise on Bills*, p. 173, ed. of 1817, is of opinion that where the bill has been lost after it became due, there is no reason why

¹ *Ante*, 671.

the person who lost it should not be permitted to proceed at law, without offering an indemnity, inasmuch as the law would, in such case, secure all the parties to the bill against future liability to a person who becomes the holder of it after it falls due. This is undoubtedly correct, provided the maker of the note, or acceptor of the bill, could prove that it came to the hands of the holder after due. If, in the present case, the plaintiff recovers against the defendant, and subsequently a suit is commenced on the note by another, claiming to be a *bona fide* holder, the recovery had would not alone be a sufficient defence. The defendant must also prove the fact, that it was due when it was lost by the present plaintiff. If he could not, then the subsequent holder would recover, on the ground that it did not appear he received the note after it became due.

It is not necessary that the plaintiff should have a remedy at law in such a case. His redress is ample in equity, where the defendant can be protected against subsequent liability. I have not found any adjudged case on this precise point; but, from the reason of the thing, and the analogy to cases where notes have been lost after they were indorsed, I think the action cannot be sustained, without proving that the note was destroyed.

Judgment affirmed.

A different rule from that declared in the above case prevails in several States. See Fales v. Russell, *infra*.

ELISHA F. FALES *et al.* v. WILLIAM O. RUSSELL *et al.*

(16 Pickering, 315. Supreme Court of Massachusetts, March, 1835.)

Action at law maintainable on lost negotiable paper. — Where a negotiable promissory note, indorsed in blank, was stolen from the holder before it was due, *held*, that he might recover the amount from the maker, in an action at law, on filing a bond sufficient for the maker's indemnification.

ASSUMPSIT upon two joint and several promissory notes, dated June 29, 1832, made by the defendants, and payable to E. W. Calef or order, in nine months from the date, one note being for

the sum of \$313.56, and the other, for the sum of \$300. The declaration contained the general counts; but there was no count declaring upon the notes.

By an agreed statement of facts it appeared, that the notes, which had been indorsed in blank by the payee, were on September 10, 1832, stolen from the plaintiffs, who were then the holders, that the notes had never been paid or heard of since the theft, to the knowledge either of the plaintiffs or of the defendants; that immediately after the notes were stolen, the plaintiffs informed the defendants of the fact, requesting them not to pay the notes to any person but to the plaintiffs themselves, or to their order in writing, separate from the notes; that notice of the theft was given immediately in the newspapers, cautioning all persons against buying them; and that the plaintiffs had offered to indemnify the defendants against any loss, if they would pay to them the amount due upon the notes.

Upon these facts, the Court were to enter up such judgment for the plaintiffs or for the defendants, as should be conformable to the law of the case, and to order a default or a nonsuit, according as they should determine that the plaintiffs had sustained or failed to sustain their action.

SHAW, C. J. There is little doubt, that according to the law as now administered in England and New York, it would be held upon the facts of this case, that the plaintiffs could not recover. But we think it would be on the ground taken originally, that in such cases it is much better for parties to go into chancery, where all the circumstances of the loss of the securities can be better investigated, and the suitable indemnities for the defendants better estimated and adjusted; and having been so held in many instances, the rule has become established by precedent, that an action at law will not lie. If this rule is adopted for convenience, and is not founded upon principles which exclude the action of a court of law, then it will not apply where there is no such remedy in chancery. Considering the question in this view, we think that without usurping the powers of a Court of Equity, and upon well-established common-law principles, we can afford the plaintiffs a remedy.

The objection to the plaintiffs' recovery is, that they cannot produce and file the notes. Is this conclusion correct? The de-

livery up of notes and other negotiable securities, upon payment of them, and the filing of them in court, on obtaining judgment, are not conditions precedent of the right to recover in either case. That right depends upon other grounds. The delivery up of the note in the one case, and the filing it in the other, is only that reasonable acquittance and discharge, adapted to the nature of the obligation performed, which any man, upon making satisfaction of a demand against him, is reasonably entitled to have. Inasmuch as it is payable to any holder, the actual surrender of the security upon payment is the proper and suitable acquittance.

I have said that the right to receive depends upon other grounds; to wit, that the note was made by the defendants, payable to the payee or order, that it was duly indorsed by him to the plaintiff, who became the *bona fide* holder. All these must appear, and in general the presence of the note is necessary to enable the plaintiff to prove them; but they may be proved without producing the note, and in the present case they are admitted. The plaintiffs having proved title in themselves, by a well-known rule of evidence, such title will be presumed to continue, till a transfer, release, or satisfaction is shown. Upon a case like this, where a note has been lost after it was due, it has often been held, that a plaintiff is entitled to recover without the note. *Jones v. Fales*, 5 Mass. 101. But the title is in fact the same; the only difference is, that the defendants are exposed to greater risk in the one case than in the other, because, if lost before it was due, there is a possibility that it may have been negotiated to a *bona fide* holder in the ordinary and regular course of business before it was due. But as this does not affect the plaintiff's title or his actual and real interest in the debt and in the security according to its tenor, but only leaves the defendant exposed to a hazard which, according to mercantile law and the usage of trade, it is not understood that he is to take, we think he ought to be protected; and this Court, as a court of law holding a just regulating power over the judgments and proceedings before them, have authority to prescribe an equivalent security to the defendants, by a sufficient and reasonable indemnity.

To illustrate this view, let us consider a suggestion made by one of the Court, at the argument, in the form of a query, whether it would not be competent for the Court, in the exercise of a just judicial discretion, to continue this action from term to term, until

the statute of limitations should become a bar to any action by any other holder. It cannot admit of any reasonable doubt, that this would be within the power of the Court; and cases may be imagined in which this would be a proper remedy. But what would this imply? Not that the production of the note is a condition precedent to the right of recovery; because at the end of six years the plaintiff must recover upon the legal right of action which he had when the suit was commenced, or not at all. But it must be on the ground that the lapse of time and the statute of limitations, would afford to the defendants, on rendering judgment against them, a security against the reappearance of the note, equivalent to that usually obtained by the production and surrender of the note. Still it would not be the same identical security, which the general rule of law requires. If that can be done, it seems difficult to conceive any good legal reason why other ample and equivalent security may not be substituted.

Considering it in this view, that the production of the note is not essential to the plaintiff's title, but only to the defendant's reasonable security, it appears to us that the objection that a court of law has no jurisdiction to order, or to judge of the sufficiency of an indemnity, is rather ideal than solid, and ought not to prevail when the consequence would be an entire failure of justice. On the whole, the Court are of opinion, that on filing a sufficient bond of indemnity, with sureties, the plaintiffs will be entitled to recover.

Defendants defaulted.

The cases which have considered the subject of the two preceding and conflicting decisions are very numerous, and about equally balanced. They are collected in 2 Parsons, Notes and Bills, 297, 298, notes *k*, *l*, and *m*.

An intermediate rule is adopted in Ohio, and supported with strong reasons. The rule in that State is that an action at law will lie if the paper was lost after maturity; but if lost before maturity, the remedy must be in chancery. *Thayer v. King*, 15 Ohio, 242. *Reul, J.*, in pronouncing the opinion of the Court, said: "This case was reserved for the determination of the single question, whether a recovery could be had upon lost negotiable paper, at law, or whether the remedy in such case was in equity.

"Upon this question, there is a conflict of decisions, both in England and the United States. In the decisions which have been made, different and various reasons have been assigned in support of either side; but from a careful review of the authorities, and a full comprehension of the principles of law controlling the transfer and fixing the right of holders of negotiable paper, it would seem that the only difficulty in the case grows out of the question of indemnity. All

other matters, and the rights of parties, can be governed, controlled, and modified in a court of law as well as equity.

“It is a necessary and fundamental principle of negotiable paper, that the innocent holder receiving it before due, is entitled to its proceeds. This is the essence and life of its negotiability. Hence, if the maker should be compelled to pay in case of negotiable paper lost before due, such payment would be no bar to the recovery in the hands of an innocent holder, who had received it before due; and in such case a double recovery might be had upon the same instrument. But if former payment or recovery would be a complete bar to any subsequent payment or recovery, the reason of the rule ceases, and the objection to a recovery by the owner, no longer exists. Hence, if the circumstances of the case are such that the negotiable paper can never be produced for payment a second time, or if produced would permit no right of recovery in the hands of the holder, no indemnity in such case being required to guard against a second payment, recovery may be had in a court of law. Thus, if the instrument be totally destroyed, or if it pass into the hands of the holder, charged with all the equities which exist against the original holder, the action may be at law. Now, it is a well-recognized principle, that negotiable paper received after it is due, is charged with all the equities existing between the original parties. So, if payment be made to the original holder, and a recovery be had by him, it would constitute a complete bar to another action brought by any person who should receive it after due. But if it be lost before due, and the original holder commence suit, there is a possibility that the paper may be outstanding in the hands of an innocent holder — upon which recovery could be had; and hence the law will not permit, in such case, a recovery to be had until complete indemnity is furnished against such possibility. Now a court of law has not the power to compel this indemnity; and hence is forbidden to give judgment or to entertain jurisdiction of the case. A court of law proceeds upon fixed principles, and if the party is entitled to judgment, he is entitled to execution without limit or restraint. But a court of equity being called upon to give its aid, will guard the rights of all parties, and will not permit a recovery until the party seeking it will guard the opposite party from a danger which exists by the misfortune of the very person seeking its aid. It will say, ‘You have been unfortunate in the loss of your instrument; we will relieve you from this difficulty, provided you will fully guard the other party from all harm which may, by possibility, result from what, except from our aid, would be a misfortune to you.’ It has the power to determine the nature of the indemnity and the security. Hence, in those cases in which indemnity is to be given, relief must be had in equity. A court of law, it is true, might do the same thing, if it had the power; and there is no direct impossibility to prevent its having such powers; yet, as such is not the case in the distribution of law and equity jurisdiction, as the systems now stand, relief can only be had in equity.

“In the case, however, before the Court, no such difficulty exists, as those notes were lost after they were due.

“Judgment for plaintiffs.”

PETER CHEWNING *v.* LOUISA SINGLETON.

(2 Hill, Chancery, 371. Court of Appeals of South Carolina, December, 1835.)

Remedy in equity. — A party who has lost a note payable to bearer, although past due, may come into equity for relief. The ground of jurisdiction is not only that he may give indemnity to the defendant, but that he must swear to the loss.

THIS bill was filed against the defendant, as executrix and sole legatee of Mrs. Anne Chewning, alleging that the testatrix, in her lifetime, for a valuable consideration, gave the plaintiff her promissory note for \$650, payable to him or bearer, at ten days after date, and dated in September, 1832. That the note was seen by divers persons in his possession, and that in October, 1832, (after the testator's death), he lost his pocket-book and in it the note. That he has (through her agent) given the defendant notice of the note and its loss, and demanded payment, which has been refused. The bill prays that defendant may answer its allegations, and that the payment of the amount of the note with interest may be decreed, on such terms of indemnity to the defendant against any future liability, as the Court may think proper to impose, and for general relief.

The bill was sworn to 15th January, 1834, and filed the same day.

The answer of the defendant denies any knowledge of her testatrix's indebtedness to the plaintiff, or of the note, or of any transaction by which such a debt could have been created. That shortly before the testatrix's death, she heard her say she owed the plaintiff nothing; and the defendant does not believe that any such note ever existed. She submits that the plaintiff has an adequate remedy, if any, at law.

JOHNSON, CHANCELLOR. This case was heard upon bill and answer. A motion was made to dismiss the bill for want of equity. The motion is granted and the bill dismissed with costs. The note alleged to be lost, and which the bill seeks to set up was, by the plaintiff's own showing, past due when it was lost; and thus the necessity for indemnity no longer exists. The bill is not a bill for discovery; and if it was, all evidence on the plaintiff's part is

excluded, inasmuch as the answer gives no discovery, but denies that such a note ever existed; and the plaintiff has adequate remedy at law.

The plaintiff appealed, and now moved to reverse the decree on the following grounds: —

1. That the chancellor erred in supposing that the necessity for indemnity is the ground of equity jurisdiction; whereas it is submitted that the indemnity is the condition which the Court annexes; and that the fact that no necessity exists to require the plaintiff to give it, cannot affect his claim to relief.

2. That there is no adequate relief at law, and chancery will afford it.

HARPER, J. My views of this case may be gathered from what has been said by me in the case of *Davis and Tarleton v. Benbow*, 2 Bail. 427. I have again looked into the authorities on the subject, and find no reason to change any of the views there expressed. It is not questioned but that in some cases a party may come into equity to be relieved, when a bill or note has been lost or destroyed. The cases of *Walmsley v. Child*, 1 Ves. Sr. 341; *Ex parte Greenway*, 6 Ves. 812, and many others, are sufficient to establish this. The chancellor seems to have decided chiefly on the authority of *Mossop v. Eadon*, 16 Ves. 430. The master of the rolls, in that case, went upon the ground that the only purpose of coming into equity is to offer an indemnity, and as I gather from the argument in the case, it appeared that the note was not payable to order, so that it could not have been negotiated, and as no action could be maintained upon it by any one into whose hands it might come, indemnity was unnecessary. He therefore dismissed the bill. So the chancellor supposes that as the note in this case, as appears from the plaintiff's own statement was lost after it was due, there was no need of indemnity. But with deference, this seems to me to be founded in misconception. The plaintiff does indeed state that the note was lost after due; but who shall assure the defendant of the truth of that statement? Plaintiff states that he has no proof of the loss. It is for defendant's benefit that the party is required to come into equity. If an action had been brought at law, she might well have said to the plaintiff, "How can you assure me that you yourself have not negotiated the note before it became due, and that it may not now be in the hands of

a *bona fide* holder?" The right to indemnity would have been apparent.

But the case of *Mossop v. Eadon*, seems to have been overruled by subsequent decisions. In the case of *Hansard v. Robinson*, 7 Barn. & C. 90, the bill was lost after due. Lord *Tenterden*, speaking of the defendant, says: "But how is he to be assured of the loss or destruction of the bill? Is he to rely on the assertion of the holder, or to defend the action at the peril of costs? And if the bill should afterwards appear, and a suit be brought against him by another, a fact not absolutely improbable in the case of a lost bill, is he to seek for the witnesses to prove the loss and to prove that the new plaintiff obtained it after it became due? Has the holder the right, by his own negligence or misfortune, to cast the burden upon the acceptor, even for not discharging the bill on the day it became due? We think that the custom of merchants does not authorize us to say that this is the law. Is the holder, then, without remedy? Not wholly so. He may tender sufficient indemnity, and if it be refused he may enforce payment thereupon in a court of equity." In *Macartney v. Graham*, 2 Simons, 285, the bill had been indorsed specially to the plaintiff, so that no other holder could maintain a suit upon it, and it was argued, on the authority of *Mossop and Eadon*, that as no indemnity was needed, the remedy was at law. But the Court said that *Mossop v. Eadon* had been overruled by *Hansard and Robinson*.

Sir William Grant, in *Mossop v. Eadon* seems to have overlooked a ground of equity on which the greatest stress is laid by Lord *Eldon* — a still higher authority. This is the necessity imposed on the party coming into equity to make affidavit of the loss. In *Ex parte Greenway*, speaking of the decision of the court of law, in *Read v. Brookman*, 3 T. R. 151, that in case of a lost deed, profert may be dispensed with, he says: "It is questionable whether sufficient attention was paid to the consideration, that in equity the conscience is ransacked, and the party alleging that the instrument is lost, must make an affidavit that it is not in his possession or power." And in *Bromley v. Holland*, 7 Ves. 20, "The protection this Court gives in that case, is most essential to the interest of justice. Here the party pledges his conscience by his oath that the instrument is lost." *East India Company v. Boddam*, 9 Ves. 464, was a case of a lost bond. Lord *Eldon* says, that "if the bond was by a single obligee, the party sued in

this Court, stating in his bill that the bond was lost, and accompanying his bill with an affidavit that it was lost, not as evidence of the loss, but as a security for the propriety of jurisdiction." Instances are put in the cases of frauds which might be practised by the wilful suppression or destruction of the instrument, similar to what is suggested in *Davis and Tarleton v. Benbow*. It may be observed that this applies still more strongly in the case of a lost bill or note than in that of a bond or deed, as, in addition to the danger of fraudulent suppression or destruction, there is additional danger of the instrument's having been fraudulently negotiated. There is no doubt, however, but that it was intended to apply in all similar cases. Such is the view taken by Fonblanque, in his notes to the Treatise of Equity. 1 Fonb. 15, 16, 17, n. f, and by Lord *Redesdale*, Mitf. Pl. 105, 106.

It is ordered and decreed that the chancellor's decree be reversed, and the cause remanded for hearing.

Johnson, J., and O'Neill, J., concurred.

If the note or bill lost was negotiable but not negotiated, no offer of indemnity need be made as a ground of equity jurisdiction. A prayer for discovery is sufficient. *Hopkins v. Adams*, 20 Vt. 407. The facts in this case will sufficiently appear in the opinion of the Court pronounced by

REDFIELD, J. This is a bill to obtain relief, as well as discovery, in regard to a negotiable promissory note, alleged to have been lost when overdue, and not indorsed; annexing to the bill an affidavit of loss, but no indemnity being tendered to the defendants, either before or at the time of bringing the bill, the plaintiff insisting all the time that none is necessary, though he offered a release of the note. The defendants have answered the bill, testimony has been taken, the case has been heard in the court of chancery, and a decree entered for the orator, requiring him to give an indemnity, and to pay the defendants' costs. The case has been argued in this Court mainly, on the part of defendants, upon the ground that the jurisdiction of the court of chancery, in cases like the present, depends exclusively upon the offer in the bill, of an indemnity to the defendants, and that, while the orator resists this, he is not entitled to a decree.

Mr. Justice *Story*, (1 Eq. Jur. p. 103), seems to lay down the rule in the very terms contended for by the defendants' counsel. "In such a case (that of a lost instrument), a court of equity will entertain a bill for relief and payment, upon an offer in the bill to give a proper indemnity, under the direction of the Court, *an not without*." And he farther says, that "such an offer founds a just jurisdiction;" citing for the two last propositions, *Walmsley v. Child*, 1 Ves. Sr. 342, 345; *Teresy v. Gorey*, Finch, 301. He also cites *Glynn v. Bank of England*, 2 Ves. Sr. 38; *Mossop v. Eadon*, 16 Ves. 430, 434; *Bromley v. Holland*, 7 Ves. 49-21; *Davies v. Dodd*, 4 Price, 176.

Upon the slightest examination of these cases, it is apparent that they establish no such proposition as that cited from the text. All, except the first, seem

to have no bearing whatever upon the point. *Teresy v. Gorey*, as reported by Lord *Hardwicke*, in *Walmsley v. Child*, is only the case of a bill of exchange properly negotiated, and where, by the custom of merchants, no holder is entitled to require payment, until he surrenders the bill; and if it be lost, he cannot do this, and of course can maintain no action whatever at law. So that the only remedy in such case is in equity, and an indemnity should, no doubt, be required in all cases of that character. This is precisely the rule laid down in *Hansard v. Robinson*, 7 Barn. & C. 901 [14 E. C. L. 20], where it was held, that upon such a bill no action at law could be maintained, although the bill was lost when overdue. The same rule has been adopted in this State. *Lazell v. Lazell*, 12 Vt. 443. In *Glynn v. The Bank of England*, Lord *Hardwicke* does make an incidental remark to the effect, that one is not ordinarily entitled to come into a court of equity for relief on a lost note, but that he may come for a discovery, and then must seek his relief at law. But the case is decided altogether upon the ground of defect of proof, that the testator had the notes in his possession at the time of his decease (the bill being for the benefit of the estate). *Mossop v. Eadon* is the case of a bill cut in halves, and one part only lost. In such a case, I understand, there has never been any difficulty in recovering at law, even where the bill or note is strictly negotiable, and had been negotiated.¹ This case was tried by the master of the rolls, who seemed to suppose, as almost all the elementary writers upon the subject do, that *Walmsley v. Child* had settled the law, that the court of chancery had no jurisdiction in the case of a lost note to grant relief, except where an indemnity was necessary. *Bromley v. Holland* is upon a totally different subject; that is, whether a court of equity will sustain a bill to decree the surrender of an impeached bill or note, to be cancelled. The decision is in favor of the jurisdiction. The subject of equity jurisdiction in regard to lost instruments is introduced in the opinion *arguendo*, merely to illustrate the subject in hand. The case of *Davies v. Dodd* is a mere *dictum*, at most. In that case the only indemnity tendered was the bond of the plaintiff, and he confessedly irresponsible. Still, the jurisdiction was entertained, and the case referred to the deputy remembrancer to determine upon the sufficiency of the indemnity offered, and if any other were requisite, what was sufficient. . . .

And first, in regard to the case of *Walmsley v. Child*. Mr. Justice *Story* says (Eq. Jur. p. 100, in note), "The passage is singularly obscure, and of difficult interpretation; and I have not been able to satisfy my mind, what Lord *Hardwicke's* real doctrine was, or what were the three cases to which he alluded." The three cases of Lord *Hardwicke* are very apparent. 1. "If the deed, or instrument, concede the title of land, and possession prayed to be established." 2. "Another case is of a personal demand, where loss of a bond, a bill in equity on that loss, to be paid the demand." 3. "Another case, in which you may come into this Court on a loss, is, to pray satisfaction and payment of it upon terms of giving security." But this case is put mainly upon the ground of the want of an affidavit of the loss accompanying the bill. Lord *Hardwicke* more than once says that such an affidavit is indispensable to the jurisdiction. The same course of reasoning is pursued in *Whitefield v. Fausset*, 1 Ves. 388. In *Walmsley v. Child* there was neither an affidavit of loss, nor offer of indemnity; but the affidavit is no doubt indispensable. Without that, the whole proceeding may be a mere contrivance to change the jurisdiction, while the plaintiff

¹ See *Bank of the United States v. Sill*, *post*, 699.

all the while has his note in his pocket. With this safeguard, there seems to me to be no difficulty in maintaining the jurisdiction, upon grounds well recognized in courts of equity.

It is obvious, there will be two classes of cases, where a court of equity will be called upon to interfere in the case of lost instruments; perhaps three. 1. The holder or loser of such instruments will apply for a decree of payment. 2. If the loser choose to proceed at law, the maker may apply to a court of equity to decree him a suitable indemnity. 3. The loser may apply to a court of equity for a discovery, merely, in aid of a court of law.

In regard to the first case, so far as relates to promissory notes not negotiable, or not negotiated, where the loser may sue at law, the principal ground of the jurisdiction must be the necessity of a discovery and the accident, by which that which the parties have constituted the evidence of their contract, has become incapable of performing its destined office. A court of equity will grant relief in all cases of accident or mistake where one party has thereby put it out of his power to obtain what it was intended he should enjoy. So, too, according to the English equity practice before the time of Lord *Thurlow*, and which has been adopted as the standing rule of practice in this country, the plaintiff may, in every case of a bill for discovery, pray relief if he choose; and if, upon obtaining the discovery, the case seems to be one, not specially requiring to be heard in a court of law, for the purpose of a jury trial, or some other, then the court of equity will, in their discretion, proceed and determine the case. In practice, in this country, the case is almost uniformly determined in the court of equity, when once carried there, even for a discovery. And for this purpose, all that seems necessary, to found a jurisdiction for relief, is a bill for discovery, alleging a defect of proof at law, by reason of the loss of the note, with a prayer for relief, and an affidavit of the loss. The offer of indemnity seems to be a matter, in which the defendant is solely interested, and not to form any just basis of an equity jurisdiction on the part of the plaintiff, unless it is wholly to oust the legal forum, — which it has not yet done, except in the case of paper negotiated. The indemnity is a matter in which it seems to us safe to suffer the defendant to move.

2. If the bill is brought by the defendant to restrain the loser of the note from proceeding at law until he give the maker indemnity, then, indeed, the necessity for indemnity is the sole ground of the jurisdiction. The case will, in this view, turn exclusively upon the question of the defendants' being entitled to indemnity. If that point is made out, the case will be finished in the court of equity; if not, the bill will be dismissed. But that the plaintiff's case should be made to rest, for its jurisdiction, upon offering an indemnity to the defendant, which he may or may not be entitled to, is certainly not consistent with our views of sound chancery law.

3. If the party seek a discovery merely, he is not required to make affidavit of the loss. And when he seeks relief also, and omits to make affidavit of the loss upon filing the bill, he may, no doubt, amend in this particular; and if the defendant omit to demur, but answer admitting the loss, the want of an affidavit is no ground of dismissing the bill. *Findlay v. Hinde*, 1 Peters, 241-244; *Livingston v. Livingston*, 4 Johns. Ch. 294; 1 Dan. Ch. Pr. 449, 450; and notes, Perkins' Ed.

But in the present case there is an affidavit; and we think there is not now, the claim being barred by the statute of limitations, if there ever was, any necessity of an indemnity to the defendant. The decree of the chancellor must be reversed, and a decree for the plaintiff without indemnity and without costs.

See *Blade v. Noland*, 12 Wend. 173; *Des Arts v. Leggett*, 16 N. Y. (2 Smith) 582; s. c., 5 Duer, 156.

SAMUEL B. TUTTLE *v.* LAFAYETTE F. STANDISH AND
TRUSTEES.

(4 Allen, 481. Supreme Court of Massachusetts, September, 1862.)

Action at law. Indemnity.—The owner of a lost note cannot maintain an action at law against an indorser, in a case where a bond to indemnify the defendant against being called on a second time to pay the note would not afford to him an adequate protection.

CONTRACT against the indorser of a lost note of \$500, signed by one Pritchard and given by him as a business note to the defendant, to whose order it was payable, and by whom it was indorsed to one Newell, who transferred it to the plaintiff before its maturity. At the trial in the Superior Court, before *Morton, J.*, various questions arose which are not now material. The judge directed a verdict to be returned for the plaintiff, and reported the case for the determination of this Court.

HOAR, J. The principles upon which the right to recover on a lost note depends, have been fully considered in a case which came before us since this case was argued. *Tower v. Appleton Bank*, 3 Allen, 387.¹ The general rule is, that where the writing is merely the evidence of a contract, the loss or destruction of the writing does not destroy the cause of action, but renders secondary evidence admissible. But where, from the nature of the contract, the party answerable upon it is entitled to have the writing delivered up to him, for his security, or to enable him to enforce his rights under it, when he is called upon to perform it, as in the case of a negotiable bill or note, if it is lost or destroyed, an action cannot be maintained upon it, unless his rights can be fully secured by a bond of indemnity, or other sufficient security. In the case of the maker of a negotiable promissory note payable to bearer or

¹ *Ante*, 674.

indorsed in blank, the maker being the party ultimately chargeable, the only hazard to which he is exposed, is that he may be called upon a second time to pay it to a *bona fide* holder ; and against this risk a bond of indemnity seems to afford an adequate protection. The acceptor of a bill of exchange is in a similar position, except that he may want the bill as a voucher in his settlement with the drawer. But even in these cases, the settled doctrine in England and in New York has been, that the only remedy was in equity, if the note or bill was lost ; their courts considering that a court of law had no authority to order an indemnity to a defendant, as a condition of the plaintiff's right to recover. This doctrine has been recently modified by statutory provisions.

In the absence of general equity powers, it was early held in this Commonwealth that the owner of a lost note might recover against the maker, upon giving a bond of indemnity, and that a court of law might require such a bond to be given. *Jones v. Fales*, 5 Mass. 101 ; *Fales v. Russell*, 16 Pick. 315 ;¹ *Almy v. Reed*, 10 Cush. 421. But all the considerations against allowing such a recovery apply more forcibly to the case where payment is demanded of an indorser ; for he is entitled to the possession of the note, in order to have his recourse over against the maker. *Story, Notes*, § 108. And see *Smith v. Rockwell*, 2 Hill (N. Y.), 482.² And it is apparent that a mere bond of indemnity against being compelled to make a second payment is usually no sufficient substitute to the indorser for the production and delivery of the note. In pursuing his remedy over, he needs the instrument as the evidence of his own right. When he has received it from the indorsee by payment, it still retains its negotiable quality. He may wish to dispose of it to a purchaser. If he may do this by an indorsement on a copy, when the original is lost, how is he to transfer or preserve the evidence necessary to make it available ? He may have occasion to transmit it for collection to distant places, and the mass of evidence to supply its place is by no means equally transmissible, or equally permanent. If he sues the maker, he is not only put to additional trouble and inconvenience in establishing his claim, but is obliged in his turn to furnish a bond of indemnity. There are many cases in which it is difficult to see how a complete equivalent for all that he loses in the loss of the paper can be secured to him.

¹ *Ante*, 683.

² Cited in full, p. 697.

It is very evident that if one is bound by contract to furnish a negotiable note to another, it would be no legal or equitable performance of that obligation to furnish evidence that the note has been lost or destroyed, and to assign the mere right of property in the contract of which the missing paper was the evidence.

There was no case cited at the argument in which there had been a recovery at law against an indorser on a lost note. In *Jones v. Fales*, 5 Mass. 101, the action was upon several notes; and a part of them were indorsed by the defendant, and on the others he was promisor. The Court in their opinion make no distinction as to his liability in these different capacities. But it is to be observed of that case, 1. That no point respecting such a distinction was made or presented to the Court; 2. That the notes were lost from the files of the Court, so that one party was no more responsible for the loss than the other; and 3. That the notes were found before any judgment was rendered. It is not therefore an authority of much weight upon the question now before us. In *Freeman v. Boynton*, 7 Mass. 483, 486, it was said by Mr. Justice *Parker* that a demand on the maker upon a lost note would be sufficient to charge the indorser, if accompanied with a tender of sufficient indemnity; which would seem to imply that a claim upon it might be maintained against the indorser; but the point was not decided.

In *Renner v. Bank of Columbia*, 9 Wheat. 581, a judgment was recovered against an indorser upon a lost note; but no point was made of any distinction between his case and that of a promisor. In that case, also, it appeared that there had been a previous suit against the maker, in which the note had been used.

Considering the point an open one in this Commonwealth, we do not mean to say that the reasoning of the Court in *Fales v. Russell* is not, in many cases, as applicable to the case of an indorser as of a promisor. If, for example, the note were proved to have been made for the accommodation of the indorser, a simple bond of indemnity might be a sufficient protection to the defendant. If the holder had previously recovered a judgment against the maker, an assignment of the judgment, with such a bond, might secure his rights substantially. And these securities might perhaps be as well afforded in a suit at law, as a condition of the issuing of an execution, as in a suit in equity. But with the full equity jurisdiction now existing in Massachusetts, it cannot be necessary to

attempt to extend the functions of a court of law to any doubtful cases, for which equity affords a more appropriate remedy. That jurisdiction allows so much greater latitude in adapting its processes and decrees to the particular circumstances of each case, that, with its power of embracing and adjusting in one suit the rights and claims of all parties in interest, it seems to furnish the proper tribunal for the prosecution of a claim like that which we are now considering. A simple bond of indemnity would not be an adequate protection to the defendant; and it would be a novel, and as it seems to us, an impracticable course, to attempt to devise and impose an obligation on the plaintiff to do all the affirmative and positive acts which the assertion of the defendant's rights against the maker of the note might hereafter require.

Whether even a court of equity could give relief, might depend upon circumstances not fully developed.

The objection to the plaintiff's recovery not being the want of an original cause of action, nor that the cause of action has been extinguished, but that he is unable, perhaps by a misfortune only temporary, to produce the paper necessary as the foundation of a judgment, it seems to us that he should have the election to become nonsuit, if he shall be so advised; otherwise the verdict to be set aside and judgment entered upon the report for the defendant.

In *Smith v. Rockwell*, 2 Hill, 482, it appeared that before the note sued on became due, it was lost or mislaid by the plaintiff; but demand was made at maturity, and notice of non-payment given, without any objection on account of the absence of the note. No bond of indemnity was offered to or requested by the maker or indorser, who were jointly sued in this action; and it did not appear that either knew of the loss till suit was commenced. The note was found before the trial, and produced and proved as in ordinary cases. Defendants moved for nonsuit on two grounds: 1. That no bond of indemnity was tendered to the defendants when the note was protested for non-payment. 2. That the plaintiffs were bound to prove that indemnity had been tendered to the defendants before suit. The motion was denied, and verdict and judgment given for the plaintiffs. Defendants appealed. The opinion of the Court above was pronounced by

NELSON, C. J. If the makers had offered to pay the note in question, but declined on finding that it was lost, or if the indorser had proposed to take it up on receiving notice of protest, with a view of calling upon his principals, the question would have been different from the one now presented. The note being negotiable, neither was bound to make payment without receiving it as their

voucher; or upon tender of ample indemnity against any future liability. This has been deliberately settled, and for the most satisfactory reasons. *Hansard v. Robinson*, 7 Barn. & C. 90; *Rowley v. Ball*, 3 Cow. 303; ¹ *Chitty, Bills*, 423; *Chitty, Jr.*, 53. An indemnity may be required in such cases, with a view to proceedings in a court of equity to compel payment notwithstanding the loss.

Tender of indemnity should be made to both maker and indorser at the time of demand and notice; because, as the former is not bound to make payment without the production of the note, or indemnity in case of loss, for that very reason payment ought not to be required of the latter till the proper steps have been taken to secure his immediate recourse against his principal. Besides, the indorser's own liability upon the paper demands indemnity to himself, which should be given without delay, so that he may be in a situation to pay the demand at any time after notice, and look to the maker. Any prejudice he might suffer by reason of neglect on the part of the holder to give the necessary indemnity in either case, would no doubt afford ground for refusing to enforce payment against him on application to a court of equity for that purpose. The holder, therefore, should take the necessary steps, with all reasonable diligence, to secure a speedy resort to that court in behalf of the surety; as the consequences of delay would justly fall upon the holder, so far as the indorser or any other party standing in that relation upon the paper is concerned.

The statute (2 Rev. Sts. 327, § 95, 96, 2d ed.) allows a remedy at law upon a lost negotiable note and bill of exchange, upon giving a bond to the adverse party in a penalty of double the amount of the note or bill, with two sureties to be approved by the court in which the action is pending, conditioned to indemnify him, his heirs, and personal representatives against all claims on account of the same, and against all costs and expenses by reason thereof. This statute, however, only applies to the remedy, and in no way affects the rights or liabilities of the parties arising out of the proceedings to charge the drawer or indorser. These stand upon the principles of commercial law, the same as before the enactment; and any defence that might before have been available at law, if the note had not been lost, or in equity, if lost, must be equally so since the statute.

But the note in question does not fall either under the doctrine that calls for indemnity with a view to proceedings in equity, or under the above provisions of the statute. It is not a lost note, nor can it be so regarded by either maker or indorser. A copy was duly served with the declaration according to the statute, and the original produced on the trial; and though it was supposed to have been lost by the holder at the time it fell due, still it was duly protested and notice given in the ordinary way, without any exception being then taken by either party on account of the non-production at the time. Nor have their rights been at all affected one way or the other by the temporary loss of it. I am of opinion, therefore, that the judgment is right, and ought to be affirmed.

Judgment affirmed.

¹ *Ante*, 680.

THE BANK OF THE UNITED STATES *v.* SILL.

(5 Connecticut, 106. Supreme Court, July, 1823.)

Commercial paper cut in halves. — If the holder of a bank-bill voluntarily cut it in halves, for the sole purpose of transmitting it by mail with greater safety, this will not affect his rights upon such bill. To entitle him to recover on the production of but one of the parts, he must show that he is owner of the whole, and account for the absence of the other part.

The parts of a divided bank-bill are not separately negotiable.

Notice by the payor of cut bills. — The board of directors of the Bank of the United States gave notice that the bank would not hold itself responsible upon any of its notes which should be voluntarily cut into parts, except on the production of all the parts; which notice was published in all the newspapers of the city of Philadelphia, at which place said bank was located; *held*, that the rights of a person in Connecticut, who subsequently became the owner of a note so cut into parts, and who was in possession of one of the parts, and who had never received the notice, were not affected by the same.

THIS cause was tried before the Superior Court, October term, 1822, on the plea of non-assumpsit; when the jury returned a special verdict, containing the following statement of facts. On the first of January, 1817, the defendants, at Philadelphia, made and issued their promissory note, commonly called a bank-bill, signed by William Jones, their president, and countersigned by Jonathan Smith, their principal cashier, promising to pay to C. S. West, or bearer, on demand, one hundred dollars, of which the plaintiff, on the fourth of December, 1819, became the lawful bearer. For the purpose of transmitting this bill safely, by mail, from Harpersfield, in the State of Ohio, to Lyme, it was divided, by Robert Harper, the agent of the plaintiff, who held it as the plaintiff's property; and one-half was enclosed in a letter, directed to the plaintiff at Lyme, which was deposited in the post-office at Harpersfield, and was, on the tenth of January, 1820, received by the plaintiff. On the twelfth of February, 1820, Harper enclosed the remaining half of the same bill, in another letter, directed to the plaintiff at Lyme, and deposited it in the post-office at Harpersfield. It was forwarded by the postmaster at Harpersfield

but never arrived at the post-office in Lyme, nor was it ever received by the plaintiff, but was lost to him. On the fifteenth of May, 1820, the plaintiff, having in his possession the first-mentioned half, and being the lawful owner of said bill, presented such half to the defendants, and demanded payment of the bill, according to its tenor, and gave notice and offered proof of the facts before stated. The defendants refused to pay the bill on any other terms than the production of both halves of it; and have never paid it.

On the twenty-fourth of August, 1819, the board of directors, at their legal and regular meeting, at their banking-house in Philadelphia, passed the following order: "Bank of the United States, August 24, 1819. The frequent demands made upon the bank, for the payment of its notes, on production of half notes, alleging the loss of the corresponding halves, and the liability to imposition and fraudulent practices, to which it is exposed, by paying such claims; from which, it is advised, it cannot be duly protected by any evidence, which may accompany such claims, or any security which may be given to indemnify it, render it necessary to re-^xfuse payment of such demands. They grow out of the voluntary act of the party who separates the parts of the notes; and he alone ought to bear the inconveniences and losses consequent upon the act. But as the practice, however improper, has been a common one, and the bank is unwilling, without apprising the public of its intention to withhold even a questionable claim upon it, these demands will be met as usual heretofore until the first of November next. But notice is hereby given, that the Bank of the United States will not, after the first of November next, hold itself responsible upon any of its notes, which shall be voluntarily cut into parts, except on the production of all the parts. By order of the board of directors. Jonathan Smith, cashier."

This notice the bank caused to be published in all the public newspapers printed in the city of Philadelphia, for three weeks successively, before the plaintiff's bill was divided; but none of such papers were received by the plaintiff, or circulated in the town of Lyme.

Upon these facts the Superior Court rendered judgment for the plaintiff to recover the amount of the bill, with interest from the time he demanded payment of the bank. The defendants thereupon brought the present writ of error.

PETERS, J. The plaintiffs in error contend, 1. That the facts alleged and found are not a sufficient foundation for the admission of secondary evidence to supply the want of a *profert*. 2. That the loss or destruction of the bill proceeded from the voluntary act of the defendant in error. 3. That the plaintiffs in error are not liable, in any event, after the publication of their determination not to pay "cut notes," unless all the parts are produced.

As to the first exception, it is a well-settled rule, that in declaring upon simple contracts a *profert* is not necessary; and its omission is a mere matter of form, and can be taken advantage of only by a special demurrer. 1 Swift, Dig. 675; 1 Chitty, Plead. 349; *Salisbury v. Williams*, 2 Salk. 497. An excuse for the omission is therefore unnecessary. But an excuse has been alleged and found; was this sufficient to introduce secondary evidence? If it was improperly admitted, the remedy is a motion for a new trial. It is no ground for error. 3 Day, 29.

But it is said that the bill is not lost or destroyed, but only mislaid. In *Beckford v. Jackson*, 1 Esp. 337, the plaintiff counted on a deed as "lost or mislaid," upon which issue was taken; and the same was recognized by Lord *Kenyon* as warranted by law; and by the Court for the correction of errors in New York, *Livingston v. Rogers*, 1 Caines Cas. in Error, 27, proof by a witness that the paper in question was thrown aside as useless, and that he believes it lost or destroyed, will be sufficient to let in secondary evidence. 1 Phil. Evid. 347, *et seq.*; *Rex v. Johnson*, 7 East, 66; *Kensington v. Inglis et al.*, 8 East, 273.

2. It is said that the loss or destruction of the bill proceeded from the voluntary act of the defendants.

When the holder of a bill voluntarily and intentionally destroys it, or alters it fraudulently, he has no remedy; but if he loses, cancels, alters, or destroys it, by accident or mistake, his rights are not affected; his evidence only is impaired. A bill or note is not a debt; it is only primary evidence of a debt; and when this is lost, impaired, or destroyed *bona fide*, it may be supplied by secondary evidence. Was this bill divided and put into the post-office with a view to abandon or destroy it, or to defraud the bank? The verdict expressly finds that this was done solely for the purpose of transmitting it from Ohio to Connecticut by mail, the most usual, safe, and expeditious mode of remittance. The act was indeed voluntary; but the intent was to *preserve*.

Where then is the evidence of voluntary, negligent, or fraudulent loss, or destruction of the bill?

But it is contended that the bank is equally liable to the *bona fide* holder of the other moiety. This would be true if the moiety of a bill were negotiable. Cases innumerable are found in the books, where a party may recover, who has lost the primary evidence of his claim; but not if it be negotiable, unless it be destroyed. 1 Phil. Evid. 347, *et seq.*, and cases there cited. For the *bona fide* receiver or holder of negotiable paper without notice is always safe. *Miller v. Race*, 1 Burr. 452. But a part of a bill is not negotiable; and the holder cannot recover upon it without proving a title to all the parts. In the present case, the plaintiff is the possessor and bearer of one moiety, and proves himself the owner of the other; which the possessor or bearer of the last moiety can never do. He must have received it with notice that the other moiety belonged to somebody else; and taken it, not on the credit of the bank, but of the bearer, to whom alone he can look for indemnity. Of all the authorities which have been cited, by the plaintiffs' counsel, one only is in point; for the case of *Master et al. v. Miller*, 4 T. R. 320, so much relied on, has no bearing on the case. It was an action by the indorsees against the acceptor of a bill, the date of which the jury found had been altered after acceptance, while in the hands of the payees, so as to accelerate the time of payment; and the Court, very properly, adjudged it void. But the case of *Mayor et al. v. Johnson et al.*, 3 Camp. 324, is directly in point. In that case, judgment was rendered for the defendant, by Lord *Ellenborough*, on the ground that the last half of a bank-bill was negotiable, and would enable a *bona fide* holder to recover of the bank; which, with all due deference to an illustrious judge, I am bound to say, is not law. As well might a vignette, or any other fragment torn from a bill, be considered negotiable. The only apology I can make for his lordship is, that he was on the circuit, where business is done in haste, without time and means for investigation and consideration, and where the greatest judges frequently err. "*Quandoque bonus dormitat Homerus.*"

3. The last exception is as extraordinary as it is novel, and is probably the first instance of a debtor's undertaking to prescribe terms to his creditors. It is a sufficient answer to this objection, that their notice never came to the knowledge of the defendant in error, though it was published in the Philadelphia newspapers, at the distance of two hundred miles.

All the questions presented by this record have been repeatedly decided by American courts ; and the case of *Mayor et al. v. Johnson et al.* has been expressly overruled. In *Patton v. State Bank*, and *Idem v. Bank of South Carolina*, on a similar state of facts, the Constitutional Court of South Carolina decided that the cutting or severing of a bank-bill destroyed its negotiability ; that the *bona fide* holder of a part, who owns the whole, can enforce payment ; and that the bearer of a part only has no claim on the bank, because he cannot prove title to all the parts, and he receives it with his eyes open. 2 Nott & McCord, 464. In *Arnot v. Union Bank*, 16 Niles Reg. 360, the Circuit Court for the District of Columbia decided that the half of a bank-bill is not negotiable ; and that the holder of a part, owning the whole, is entitled to recover. And in a more recent case, *Martin v. Bank of the United States*, Circuit Court, Penn. District, October, 1821, upon the precise statement of facts contained in the verdict in question, Judges *Washington* and *Peters* rendered judgment for the plaintiff, not in the hurry of a *nisi prius* trial, as has been suggested in argument, but upon a solemn review of all the cases on this subject, especially of a previous decision of their own, and of *Patton v. The State Bank*. With these decisions I entirely concur ; and am, therefore, of opinion that there is no error in the judgment complained of.

Chapman, *Brainard*, and *Bristol*, JJ., were of the same opinion.

Hosmer, C. J., declined giving any opinion.

Judgment affirmed.

In the case of *Martin v. Bank of the United States*, 4 Wash. 253, cited in the opinion, *supra*, Mr. Justice *Washington* said : “ I have carefully reviewed the decision of this Court in the case of *Bullet v. The Bank of Pennsylvania*, [2 Wash. 172] aided by the light shed upon the question involved in that and in the present case by the able arguments of the counsel on each side. My opinion remains unchanged, and is indeed confirmed by the two American cases cited at the bar, and particularly by the luminous argument of Judge *Drayton*, in the case of *Patton v. The State Bank*.

“ The principles upon which this Court decided the case of *Bullet v. The Bank of Pennsylvania* were, that a bank, or any other promissory note, is the evidence of a debt due by the maker to the holder of it, and nothing more. It is also the highest species of evidence of such debt, and in fact the only proper evidence, if it be in the power of the owner of the note to produce it. But if it be lost or destroyed, or by fraud or accident has got into the possession of the maker, the

owner does not thereby lose his debt, but the same continues to exist in all its rigor, unaffected by the accident which has deprived the owner of the means of proving it by the note itself. The debt still existing, the law, which always requires of a party that he should produce the best evidence of his right of which the nature of the thing is capable, permits him, where such better evidence is lost or destroyed, or not in his power, to give inferior evidence, by proving the contents of the lost paper; and if this be satisfactorily made out, he is entitled to recover.

“ If the evidence be not lost, but is merely impaired by accident, or even by design, if such design be not to injure the maker or to cancel the debt, the principle of law is the same. Cutting a bank-note into two parts does not discharge the bank from the debt, of which the note was but the evidence, nor does it even impair the evidence itself, if, by uniting the parts, the contents of the entire note can be made out. If one of the parts should be lost or destroyed, the debt would be no more affected than if the entire parts had been lost or destroyed. The evidence is impaired, indeed, not by the act of cutting the note, but by the same accident which would have affected the entire note, had that been lost. In both cases, the owner must resort to secondary evidence, and is bound to prove that the note did once exist, that it is lost or destroyed, and that he is the true, *bona fide* owner of the debt. If one part only of the note be lost, the difficulty which the real owner of it has to encounter in proving his right to the debt is diminished. For if the entire note be lost, the owner of it at the time of the accident may not be entitled to the debt of which it was the evidence, at the time he demands payment, because the note, passing from hand to hand by bare delivery, may have been found, and have got into the possession of a *bona fide* holder.

“ But against the real owner of one-half of the note, there cannot possibly be an opposing right. The finder or robber of the other half part cannot assert a right to the debt, because he cannot prove that he came fairly to the possession of the evidence of it. I speak judicially, when I say that he cannot prove that fact, because he cannot do it without the aid of perjury, which the law does not presume, and can in no instance guard against it. If the lost half note gets fairly into the hands of a third person, he takes it with notice that there may be a better title in the possession of the other half, and consequently he looks for indemnity to the person from whom he received the half part, if it should turn out that he was not the real owner of the entire note. It is impossible, therefore, that the bank can be legally called upon to pay the note twice; and if the officers of the institution suffer themselves to be imposed upon by insufficient or false evidence, by which means the bank is brought into this predicament, she must abide the loss as being occasioned by an error of judgment in the officers of the bank, or their want of due caution. The law cannot adapt its provisions to every possible case that may occur, and it therefore proceeds from necessity upon general principles applicable to all cases.

“ If upon any other ground than fraud, or perjury, the maker of the lost note may by possibility be twice charged, the law will not expose him to that risk by relieving the asserted owner of it; not because there may be imposition in the case, or because the debt ought not to be paid; but because the proof that the claimant is the real owner of the debt is defective; for it by no means

follows, that, because the lost note did belong to him, it may not then be the property of some other person. A court of law therefore will, in such a case, dismiss the parties from a forum which has no means of securing the maker of the note against a double charge, and leave him to one where those who ask of it equity will be compelled to do equity. The case then resolves itself very much into a question of jurisdiction. For it is quite clear that the real owner of a debt, the evidence of which is lost, is entitled to supply the want of the better evidence by that which is secondary, and this rule of evidence is the same in equity as at law. But whether the application for relief shall be in the one court or in the other, must depend upon the particular case, and its fitness for the one jurisdiction or the other.

"Many difficulties were stated by the defendants' counsel, to which the practice of cutting the notes and transmitting them by mail exposes banking institutions in identifying the part of a note when produced for payment. That these difficulties do in a measure exist must be admitted. But the bank knows that there can be but one owner of the note, and who that one is must be satisfactorily proved, to entitle him to payment of it. The bank has a just right to call for such proof; and if it be truly and faithfully given, there can be no risk in paying it. The possessor of the other half part of the note, as already observed, by whatever means he acquired it, can never oblige the bank to pay the money over again to him. But after all, the rule of law does not rest upon this circumstance. The maker of the note is bound to pay to the person who proves himself to be the legal owner of it; and the difficulties complained of are not greater than those which attend most litigated questions.

"It may not be improper here to observe, that the decision in the case of *Bullet v. The Bank of Pennsylvania* did not proceed upon any usage applicable to the case. None such was stated in the case agreed or alluded to by the Court.

"The next question is new: no case like it was cited at the bar, nor is there any within the recollection of the Court. It is nevertheless within the range of some general principles of law, by the light of which I think it may be decided.

"The question is, whether it was competent to the bank to notify the holders of her notes, that, in case they should be voluntarily cut into parts, she would not pay them, unless all the parts should be brought together? I mean to treat the question as if the notice were brought home to the plaintiff.

"It is unnecessary, in this case, to decide how far parties to a contract may, by positive stipulations, change the rules of evidence applicable to that particular contract. If they may do so, it must be upon the basis of an agreement assented to by both parties. But upon what principle is it that one party to a contract can prescribe terms to absolve himself from its obligations, without the assent of the other? I know of none. If the bank can dictate to the holders of her notes the condition stated in this notice, upon the performance of which, and not otherwise, she would pay them, she might with equal authority prescribe any other condition, and declare in what case she would pay, and in what case she would not. The note is the evidence of an engagement by the bank to pay a certain sum of money to the bearer of it; and the general law of the land declares that if such note, or a part of it, should be lost or destroyed, the debt shall nevertheless be paid, upon satisfactory proof being made of the ownership and

loss. Thus sanctioned, these notes pass from hand to hand; and if the bank can nevertheless discharge herself from her obligation to pay them, unless both parts of the note be produced, or unless the note be produced entire (and there is no difference between the two cases); then the arbitrary declaration of the bank must be stronger than the law. This observation applies with equal force to every other species of contract, where one of the parties to it attempts to prescribe to the other the rules of evidence by which alone he will be governed.

“I thought the defendants’ counsel seemed unwilling to contend that the bank could go the length of declaring that they would not pay a lost note, or one which had been torn or defaced by accident. But if the Court be correct in their opinion upon the first point, it follows that the law as much compels the bank to pay the owner of half a note, where the other half is lost, as to pay in the two cases supposed; and if so, the right of the bank to prescribe terms in the one case, if admitted, would be equally valid in the others. There can be no difference, unless it be that in the one the notes were voluntarily cut, and in the other they were torn by accident. But the owner of the debt being also the owner of the paper which is the evidence of it, he had a legal right to cut it and by doing so, he could not impair the obligation, unless he intended to do so. In all these cases, the note is cut with a view to the security, not to the destruction of the debt, by doubling the chances of preserving part of the evidence of it, in case the other part should be lost. The defendants do not forbid or condemn the practice, even if it could for a moment be admitted that they had a right to do either. That is not the gravamen stated in the notice; it is the production of one of the parts for payment, unaccompanied by the other part. That is the case in which the bank declares she will not pay, and in which the law pronounces she shall pay.

“I am of opinion that judgment should be entered for the plaintiff.”

Hinsdale v. Bank of Orange, 6 Wend. 378, was a similar case, in which Mr. Justice *Marcy* discusses, with much force, the effect of cutting the paper upon its negotiability. He said: “It has never been held, I believe, that the actual production of a bill or negotiable note is indispensably necessary to enable the holder, or him who last held it, to recover on it. If the owner of a bill *loses* it, he cannot recover; but if he can prove that it is actually *destroyed*, he may. The reason of this distinction is very obvious. Although the note is *lost* to the rightful owner, it may yet be in the hands of a *bona fide* holder, or in the hands of one claiming to be such, and the maker may be called on to pay it without having the means of showing that the holder is not entitled to payment; but if the note be *destroyed*, such cannot be the case. Let us apply this principle to the present case. What is the effect of severing the bills? They may not be absolutely annihilated, nor is their negotiability so effectually destroyed as to prevent its being restored; for after they have been cut into two parts, the parts may be put together again, and thereby the bills become as valid and negotiable as they were before; but there is no negotiability in a separate half of any one of the bills. The negotiability of these bills was destroyed, and so were the bills themselves by the severance of them, and presenting one-half of them to the defendant, for all the purposes for which a destruction of negotiable paper

is required to enable him who had the right to it to recover on it. Lord *Ellenborough*, 3 Camp. 321, thought an action could not be maintained by the person who had severed a bill, and lost one-half of it; because, if he could recover on the half not lost, the other half might fall into the hands of a *bona fide* holder, who would also be entitled to recover, and the maker ought not to be held liable to two parties at the same time. This opinion must proceed upon the ground that the lost half of the bill was negotiable; for if it was not, there could not be a *bona fide* holder of it. This appears to me to be a mistaken notion. That half of a bill by itself, and wholly separated from the other half, is not negotiable, is as clear to my mind as the proposition is certain that a part is not equal to the whole. When a bill ceases to exist as a whole, it ceases to have those properties which belong to it as an entirety, one of which is negotiability. If negotiability does not belong to a separate half of a bill or note, there can be no objection to sustaining this action on account of the non-production of the lost halves, that would not exist if those halves had been actually destroyed, because they can give to the finder or holder no more right to sustain an action against the defendants than he would have by possessing the ashes of them if they were burned. The owner of a lost negotiable note is entitled, *prima facie*, to recover against the maker by making proof of the instrument, and showing, as he would be enabled to do, that it was executed by the defendant. But such would not be the case with the holder of the lost half bills; he would be obliged to show what has been required of the plaintiffs in this case; that his possession of the half bills was rightful, and that he was the owner of the whole bills at the time they were cut into two parts; or, in other words, that he owned them at the time of their destruction; for I hold that the cutting them, under the circumstances of this case, amounts to a destruction of them as negotiable paper. I would not be understood to assert that the cutting of the notes is an absolute destruction; but, in legal effect, it is a destruction where such a disposition of either of the halves is made as to prevent their being brought together as whole notes, and thus the payment of them claimed of the makers. Such must certainly be the case where one part of them is surrendered to the makers, as was offered to be done in this instance. As to authorities, I would observe that I consider the decision of the Circuit Court of the United States for the District of Columbia, 16 Niles Reg. 360, entitled to as much respect as the *nisi prius* opinion of Lord *Ellenborough*. But it is said that the plaintiffs do not show that they were the owners of the bills when they were severed. On this point the evidence is not very full. It was proved that the agent of the plaintiffs, on the thirtieth of September, enclosed the right-hand halves of the bills in question in a letter, which was directed and sent to Mr. Rossiter at New Haven; and two days after he, as such agent, enclosed and forwarded in like manner the left-hand halves, which have not since been heard of. It would seem to me like cavilling, to say that this evidence does not show that the bills, before they were severed, or both halves, afterwards and at the same time, were in the hands of the plaintiffs; and if so, that fact is sufficient to entitle them to recover as holders. The fact of their being the owners at the time the bills were cut and mailed was left to the jury, and the evidence warranted their verdict.

“*Judgment for plaintiffs.*”

See also *Commercial Bank v. Benedict*, 18 B. Mon. 307; *Farmers' Bank of Virginia v. Reynolds*, 4 Rand. 186; *Allen v. State Bank*, 1 Dev. & B. Eq. 1. But if a bank-note be mutilated in a material part, for the purpose of fraudulently imposing it upon the public, and defrauding the bank which issued it, it is no longer binding on the bank. *Northern Bank v. Farmers' Bank*, 18 B. Mon. 506.

As to notice, see *Matthews v. Poythress*, 4 Ga. 287; *Beltzhoover v. Blackstock*, 3 Watts, 20; *Lawson v. Weston*, 4 Esp. 56; *Rowley v. Horne*, 3 Bing. 2; *Snow v. Peacock*, *ib.* 406; *Beckwith v. Corral*, 2 Car. & P. 261; *Strange v. Wigney*, 4 Moore & P. 470.

LAW OF PLACE.

B. AND I. Q. AYMAR v. SHELDON AND OTHERS.

(12 Wendell, 439. Supreme Court of New York, October, 1834.)

Bill drawn in one country and indorsed in another. — In an action by an indorsee against an indorser of a bill of exchange drawn in a foreign country, and indorsed and negotiated to the plaintiff in New York, the law of New York must determine whether the proper steps have been taken to charge the indorser.

B. & I. Q. Aymar, the defendants below, were indorsers of a bill of exchange drawn by certain parties at St. Pierre, in the French Island of Martinique, on parties at Bordeaux, France. It was made payable at twenty-four days sight to the order of the defendants, a firm in New York, at which place they indorsed it to the plaintiffs, they also being citizens of the United States.

The bill was presented for acceptance and dishonored: whereupon due notice was given the defendants, and this action instituted.

The defendants insisted that they were protected by the law of France, which is sufficiently stated in the opinion of the Court. Verdict and judgment for the plaintiffs, to reverse which the defendants sued out this writ of error.

NELSON, J. The only material question arising in this case is, whether the steps necessary on the part of the holders of the bill of exchange in question, to subject the indorsers upon default of the drawees to accept, must be determined by the French law, or the law of this State? If by our law, the plaintiffs below are entitled to retain the judgment: if by the law of France, as set out and admitted in the pleadings, the judgment must be reversed.

We have not been referred to any case, nor have any been found in our researches, in which the point now presented has been ex-

amined or adjudged. But there are some familiar principles belonging to the law merchant, or applicable to bills of exchange and promissory notes, which we think are decisive of it. The persons in whose favor the bill was drawn were bound to present it for acceptance and for payment, according to the law of France, as it was drawn and payable in French territories; and if the rules of law governing them were applicable to the indorsers and indorsees in this case, the recovery below could not be sustained, because presentment for payment would have been essential even after protest for non-acceptance. No principle, however, seems more fully settled, or better understood in commercial law, than that the contract of the indorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by indorsement is equivalent in effect to the drawing of a bill, the indorser being in almost every respect considered as a new drawer. Chitty, Bills, 142; 3 East, 482; 2 Burr. 674, 675; 1 Str. 441; Selw. N. P. 256. On this ground, the rate of damages in an action against the indorser is governed by the law of the place where the indorsement is made, being regulated by the *lex loci contractus*, 6 Cranch, 21; 2 Kent's Com. 460; 4 Johns. 119. That the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made, has been adjudged both here and in England. In *Hicks v. Brown*, 12 Johns. 142, the bill was drawn by the defendant at New Orleans, in favor of the plaintiff, upon a house in Philadelphia; it was protested for non-acceptance, and due notice given; the defendant obtained a discharge under the insolvent laws of New Orleans after such notice, by which he was exonerated from all debts previously contracted, and, in that State, of course from the bill in question. He pleaded his discharge here, and the Court say, "It seems to be well settled, both in our own and in the English courts, that the discharge is to operate according to the *lex loci* upon the contract where it was made or to be executed. The contract in this case originated in New Orleans, and had it not been for the circumstance of the bill being drawn upon a person in another State, there could be no doubt but the discharge would reach this contract; and this circumstance can make no difference, as the demand is against the defendant as drawer of the bill, in consequence of the non-acceptance. The whole contract or responsibility of the drawer was

entered into and incurred in New Orleans." The case of *Potter v. Brown*, 5 East, 124, contains a similar principle. See also 3 Mass. 81; *Van Rugh v. Van Arsdaln*, 3 Caines, 154; 1 Cowen, 107; 6 Cranch, 221; 4 Cowen, 512, n.

The contract of indorsement was made in this case, and the execution of it contemplated by the parties in this State; and it is therefore to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn, are equally applicable to the indorser; for, in respect to the holder, he is a drawer. Adopting this rule and construction, it follows that the law of New York must settle the liability of the defendants below. The bill in this case is payable twenty-four days after sight, and must be presented for acceptance; and it is well settled by our law, that the holder may have immediate recourse against the indorser for the default of the drawee in this respect; 3 Johns. 202; *Chitty, Bills*, 231, and cases there cited.

Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation; and it is therefore to be presumed that the parties had reference to it. So the protest must be according to the same law, which is not only convenient, but grows out of the necessity of the case. The notice however must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made, such being an implied condition. *Chitty, Bills*, 93, 217, 266; *Bayley, [Bills.]* 28; *Story's Conflict of Laws*, 298.

The contract of the drawers in this case, according to the French law, was, that if the holder would present the bill for acceptance within one year from date, it being drawn in the West Indies, and it was not accepted, and was duly protested and notice given of the protest, he would give security to pay it, and pay the same if

default was also made in the payment by the drawee after protest and notice. This is the contract of the drawers, according to this law, and the counsel for the plaintiffs in error insists that it is also the implied contract of the indorser in this State. But this cannot be unless the indorsement is deemed an adoption of the original contract of the drawers, to be regulated by the law governing the drawers, without regard to the place where the indorsement is made. We have seen that this is not so; that notice must be given according to the law of the place of indorsement; and if, according to it, notice of non-payment is not required, none of course is necessary to charge the indorser. But if the above position of the plaintiffs in error be correct, notice could not then be dispensed with, the law of the drawer controlling. The above position of the counsel would also be irreconcilable with the principle that the indorsement is equivalent to a new bill, drawn upon the same drawee; for then the rights and liabilities of the indorser must be governed by the law of the place of the contract, in like manner as those of the drawer are to be governed by the laws of the place where his contract was made. Both stand upon the same footing in this respect, each to be charged according to the laws of the country in which they were at the time of entering into their respective obligations.

I am aware that this conclusion may operate harshly upon the indorsers in this case, as they may not be enabled to have recourse over on the drawers. But this grows out of the peculiarity of the commercial code which France has seen fit to adopt for herself, materially differing from that known to the law merchant. We cannot break in upon the settled principles of our commercial law, to accommodate them to those of France or any other country. It would involve them in great confusion. The indorser, however, can always protect himself by special indorsement, requiring the holder to take the steps necessary according to the French law, to charge the drawer. It is the business of the holder, without such an indorsement, only to take such measures as are necessary to charge those to whom he intends to look for payment.

Judgment affirmed.

The rule declared in the principal case is stated to be the law in the text-books. Story, Promissory Notes, § 339, note; *Ib.*, Bills of Exchange, §§ 176, 177, note; Chitty, Bills, 456. A contrary doctrine, however, seems to have been declared in *Rothschild v. Currie*, 1 Q. B. 43. But Mr. Justice Story criti-

ceives this case with his usual learning and ability, and considers it unsound. Promissory Notes, § 339, note. And the case has been doubted in England. See *Gibbs v. Fremont*, 20 Eng. Law & E. 555, 557; *Allen v. Kemble*, 6 Moore, P. C. 314. But *Rothschild v. Currie* was cautiously cited as authority in the recent case of *Hirschfield v. Smith*, Law Rep. 1 Com. Pl. 349. In this case, *Erle, C. J.*, in delivering the opinion of the Court, said: "The facts were, that the bill was drawn in England, payable to the drawer's order, directed to and accepted by the drawee in France, payable in France, and was indorsed by the drawer in blank, and delivered to the defendant in England, and by him indorsed in blank and delivered to the plaintiff in England, and indorsed by the plaintiff and delivered to one Berle, in France. The bill was duly presented in France, and dishonored; and the holder took the steps required by the law of France to entitle him to recover from the other parties to the bill; that is to say, the bill was taken to the proper office and a due protest was made, and a copy of the protest was transmitted to the consul for France in the foreign country where the party to the bill was residing; that is to say, as respects the defendant, to the French consul in London; and by that consul the protest was in due course, according to the French practice, made known to the defendant without delay.

"If the action on the bill had been brought in France, upon an indorsement made in France, these facts would have amounted to such notice of dishonor as the law of France requires, and would have entitled the plaintiff to recover. As, however, this action was brought in England, against an indorser indorsing in England, the present question is, whether these facts are evidence of due notice of dishonor, against the defendant, in an action brought in England.

"Our answer is in the affirmative, on two grounds: first, because the point has been decided in *Rothschild v. Currie*, 1 Q. B. 43, where the bill was drawn, accepted, indorsed, and dishonored, under circumstances similar to those relating to the present bill, and the facts adduced to show notice of dishonor were also similar, and were decided to be sufficient because they were sufficient according to the law of France; secondly, if the reason assigned in that be not now adopted, and if the contract of an indorser in England of a bill accepted payable in France be held to be a contract governed by the law of England, and so the holder be not entitled to sue in England such an indorser unless he has given due notice of dishonor, according to the law of England, then the question is, what notice, under such circumstances, amounts to due notice. If the parties lived in England, and their address was known, the rule is that notice should be sent by the post of the day following the day of dishonor. But in respect of bills dishonored in a foreign country, such a rule cannot always have a literal application, because, among other reasons, the postal regulations may make it impossible.

"Due notice is such notice as can be reasonably required under the circumstances; and the reasonableness of the notice proved in evidence is a question of law depending on the facts of each particular case; and such facts are for the jury. . . . If by the law of the place where the bill is payable there are regulations for giving notice of dishonor, in order to make indorsers liable to the holder, a presumption is raised that notice according to those regulations is all that the indorser should require.

“The indorser of a bill accepted, payable in France, promises to pay in the event of dishonor in France, and notice thereof. By his contract, he must be taken to know the law of France relating to the dishonor of bills; and notice of dishonor is a portion of that law. Then, although his contract is regulated by the law of England relating to indorsement, and although he may not be liable unless reasonable notice of dishonor has been sent to him, yet the notice of dishonor according to the law of France may be, and we think ought to be, deemed reasonable notice according to the law of England, and be sufficient in England to entitle the plaintiff to recover according to that law.

“It is reasonable to hold that the foreign holder should have time to make good his right of recourse against all the parties to the bill, in whatever country they may be. Here the holder was a Frenchman, in France. The indorsement to him was by the plaintiff, a Frenchman, in France. The indorsement to the plaintiff was by the defendant, an Englishman, in England; and the indorsement to that Englishman by Lion, the payee, may have been in any country. The inconvenience would be great if the holder was bound to know the place of each indorsement, and the law of that place relating to notice of dishonor, and to give notice accordingly, on pain, in case of mistake, of losing his remedy; whereas there would be great convenience to the holder if notice, valid according to the law of the place, should be held to be reasonable notice for each of the countries of each of the parties, unless an exceptional case should give occasion for an exception.”

“There seems then to be a conflict between the English rule and the American, unless the difference of fact in the cases may afford a ground upon which to reconcile them. The indorsement to the plaintiff in *Hirschfeld v. Smith*, though made in England was made to a foreigner residing in the country in which the bill was payable. The Court say that there would be serious inconvenience in requiring the holder, a Frenchman, to know the law relating to indorsement in England, and so it would without doubt; but in the principal case, both the plaintiff and defendant, the holder and the indorser, resided in New York, and it was certainly reasonable to suppose that they contracted with respect to the law of New York, and not that of France. And on the contrary, to follow the reasoning of Mr. Chief Justice *Erle*, it would be quite inconvenient, if not wholly unreasonable, to have required the holder in the principal case to know the law of France, and to take the steps required in that distant country to render his own fellow-townsmen liable upon their indorsement. It is possible that *Hirschfeld v. Smith* may in this way be reconciled with the principal case; but it seems more difficult to harmonize the former with *Allen v. Kemble*, 6 Moore, P. C. 314, decided in 1844. The last-named case is a strong authority supporting the American rule in *Aymar v. Sheldon*. In *Allen v. Kemble* the Court said: “It is argued that this bill, being drawn [abroad] payable in London, not only the acceptor, but the drawer, must be held to have contracted with reference to the English law. This argument however appears to us to be founded on a misapprehension of the obligation which the drawer and indorser of a bill incurs. The drawer, by his contract, undertakes that the drawee shall accept and shall afterwards pay the bill, according to its tenor, at the place and domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of

the bill, not where the bill is to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he contracted may allow. . . .

“What then is the consequence of altering in the bill itself, and by the acceptance, the place at which the acceptor is bound to pay? Can it be more than this, that as to the acceptor the *locus solutionis* is altered, and therefore as to him, the *lex loci solutionis* is altered? But how does this affect the liabilities of the other parties? These bills are addressed to Mr. Mackie, Stranmaer, Scotland; if no place of payment had been mentioned, they would have been payable by the drawee according to the law of Scotland. London being fixed as the place of payment, they are payable by the drawee according to the law of England; a different law is imported as regards the acceptor, but not as affects other parties.” See also *Robinson v. Bland*, 1 W. Black. 234, 256; s. c., 2 Burr. 1077; *Cooper v. Waldegrave*, 2 Beav. 282.

But the law of the place of payment was applied to an indorser in *Ellis v. Commercial Bank of Natchez*, 7 How. (Miss.) 294.

The contrary rule, and the rule declared in *Aymar v. Sheldon*, has been adopted or approved in the following cases: *Conahan v. Smith*, 2 Disney, 9, per *Storer, J.*; *Hatcher v. McMorine*, 4 Dev. 122; *Wallace v. Agry*, 4 Mason. 336, 344, per *Story, J.*; *Astor v. Benn*, 1 Stuart (Canada), 69; *Slacum v. Pomery*, 6 Cranch, 221; *Hazelhurst v. Kean*, 4 Yeates, 19; *Crawford v. Branch Bank at Mobile*, 6 Ala. 12; *Williams v. Wade*, 1 Met. 82. See also *Allen v. Merchants' Bank of New York*, 22 Wend. 215, overruling s. c., 15 Wend. 482; *Lizardi v. Cohen*, 3 Gill, 430; *Frazier v. Warfield*, 9 Sm. & M. 220; *Kearney v. King*, 2 Barn. & Ald. 301; *Don v. Lippman*, 5 Clark & F. 1; *Andrews v. Herriot*, 4 Cow. 508, and the very learned note of the reporter.

As a corollary to the rule declared in the principal case, it is held that the obligation of the maker or acceptor of paper payable at no designated place, is regulated by the law of the country where the paper was made or accepted. *Story, Promissory Notes*, §§ 172, *et seq.* and cases cited. But where a place of payment is named, the law of such place will prevail. *Ibid.*

The following additional cases will be found to contain a further exposition of the law of place, in connection with bills and notes. *De La Chaumette v. Bank of England*, 2 Barn. & Ad. 385; s. c., 9 Barn. & C. 208; *Milne v. Graham*, 1 Barn. & C. 192; *Trimby v. Vignier*, 1 Bing. (N. C.) 151; *Worcester Bank v. Wells*, 8 Met. 107; *Rose v. Park Bank*, 20 Ind. 94; *Brown v. Bunn*, 16 Ind. 406; *Bernard v. Barry*, 1 Greene (Iowa), 388; *Peck v. Hibbard*, 26 Vt. 698; *Wilson v. Lazier*, 11 Grat. 477, 482; *Ory v. Winter*, 16 Mart. La. 277; *Burrows v. Hannegan*, 1 McLean, 315.

CHECKS.

JUSTIN MORRISON and ALEXANDER MORRISON *v.* ROBERT B. BAILEY and LEONARD F. BURGESS.

(5 Ohio State, 13. Supreme Court, December, 1855.)

Form. — The following draft is not a check : W. O. & B. : Pay to B. on the 13th of July, '53, or order, three hundred dollars ; it being payable on a future day designated. It is one of the essentials of a check that it shall be payable on demand.

Days of grace are not allowed on checks.

Distinction between checks and bills of exchange.

THE case is stated in the opinion of the Court.

BARTLEY, J. This suit was brought against Bailey, as drawer, and Burgess, as indorser, of a paper, of which the following is a copy : —

\$300.

CLEVELAND, O., June 30, 1853.

Wicks, Otis, & Brownell : Pay to L. F. Burgess, on the 13th day of July, '53, or order, three hundred dollars.

R. B. BAILEY.

Indorsed by L. F. Burgess.

The paper was presented to Wicks, Otis, and Brownell, for payment on the sixteenth day of July, 1853 ; payment refused, and notice of non-payment given on that day.

It is claimed, on the part of the defence, that presentment was not made, and notice given, in due time. And the question for determination is, whether this instrument, upon which suit is brought, is, or is not, entitled to days of grace ; and this depends upon the question whether the instrument is a check *co nomine*, or a bill of exchange, subject to the rules and usages governing ordinary bills of exchange.

The distinction between a bill of exchange and a check, although much confused in some respects, by the apparently

inconsistent language of some of the adjudicated cases, as well as of some of the elementary writers bearing upon it, is founded in the difference in the nature of these two classes of commercial paper. Checks, being drafts or orders for immediate payment of money, have come into such common use as to supersede, in frequent payments of considerable amounts, not only gold and silver coin, but even bank-notes. And with their general use, certain usages have grown up peculiar to that class of instruments, and which have become engrafted on the commercial law of the country. A check is subject to many of the rules which regulate the rights and liabilities of parties to bills of exchange, and so nearly resembles the latter class of instruments, that some authors have defined a check to be, in substance and in legal effect, an inland bill of exchange, payable on demand. But, as Judge *Story* well said, in the *Matter of Brown*, 2 *Story*, 592, although a check “nearly resembles a bill of exchange, yet *nullum simile est idem*.” By statute, in Ohio, all bills made negotiable are entitled to three days grace in the time of payment. Rev. Sts. 576. But days of grace, in the time of payment, would be inconsistent with the nature and purpose of a check, which requires no acceptance, and is always payable immediately on presentment.

These two classes of commercial paper, although in many respects similar, are to be distinguished in the following particulars, to wit:—

1. A check is drawn upon an existing fund, and is an absolute transfer or appropriation, to the holder, of so much money in the hands of the drawee: whereas a bill of exchange is not always, or necessarily, drawn upon actual funds in the hands of the drawee, but very frequently drawn in anticipation of funds, or upon a previously arranged credit.

2. The drawer of a check is always the principal: whereas the drawer of a bill frequently stands in the position of a mere surety.

3. As between the holder of a check and an indorser, demand of payment within due time is essential to the liability of the latter. Where the parties reside in the same place, the holder should present the check on the day it is received, or within business hours of the following day: and when payable at a different place from that in which it is negotiated, the check

should be forwarded by mail on the same, or the next succeeding day, for presentment. But days of grace being allowed to bills of exchange, the time for demanding payment of a bill is different.

4. As between the holder and drawer, however, mere delay in presenting a check in due time for payment, would not discharge the latter, unless he had been injured thereby, and then only to the extent of his loss; but a different rule, in this respect, prevails in case of a bill of exchange.

5. A check requires no acceptance, and, when presented, the presentment is for payment.

6. It is not protestable, or in other words, protest is not requisite to hold either the drawer or an indorser.

It is also settled, in *Woodruff v. Merchants' Bank*, and *Bowen v. Newell*, above referred to, that any supposed usage of banks in any particular place to regard drafts upon them, payable at a day certain after date, as checks, and not entitled to days of grace, is inadmissible to control the rules of the law in relation to such paper.

Motion for new trial overruled and judgment for the plaintiffs.

This subject of the likeness of checks to bills, and of the distinction between them, is considered in *Keene v. Beard*, 8 Com. B. (N. S.) 372. The facts will sufficiently appear in the opinion delivered by

ERLE, C. J. I am of opinion that the plaintiff is entitled to judgment on this demurrer. The action is brought by the holder or bearer of a check against the payee and indorser. The declaration states that one Bodenham on a certain day made a draft or order in writing for the payment of money, commonly called a check on a banker, and directed the same to certain persons trading as bankers, and thereby required them to pay to the defendants or bearer the sum of £11, and then delivered the said draft or order to the defendant, who then indorsed and delivered the same to one Lewis, who transferred and delivered the same to the plaintiff, who then became and was still is the lawful bearer thereof. It then goes on to allege that the said draft or order was duly presented for payment and was dishonored. The point urged by Mr. Grant on the argument of the demurrer was, that a check is not to be classed with bills of exchange so far as to be capable of creating a liability in an indorser to the person who may be the holder or bearer of the instrument. I think he has failed to establish that proposition. A check is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker; and, though in practice the banker does not accept the draft, he might for aught I know do so. A check has also some of the incidents of a bill of exchange, if not all, as, in respect of its passing by delivery, and also in respect of a *bona fide* holder taking it for value having a better title than the person from whom he received it. Having these incidents

of a bill of exchange, has it the further incident of being capable of passing by indorsement? That is, where the indorsement is made, not by merely placing the name of the party on the back of the instrument, but doing so with the intention of passing the title to it, and of incurring all the usual liabilities of an indorser of a negotiable instrument? It is admitted here that the defendant's name was placed upon the check *animo indorsandi*; and therefore our judgment for the plaintiff is in accordance with the real intention of the parties. The indorser intended to give to the indorsee the security of his name and liability on the instrument. I also think our decision is in accordance with the law, when we hold that a check is a negotiable instrument, and capable of indorsement.

BYLES, J. I am of the same opinion. I conceive that a check is in the nature of an inland bill of exchange payable to the bearer on demand. It has nearly all the incidents of an ordinary bill of exchange. In one thing it differs from a bill of exchange: it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas, it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange. There is another difference between the two instruments: in the case of a bill of exchange, the drawer is discharged by default of a due presentment to the acceptor; but, in the case of a check, the drawer is not discharged by a delay in the presentment, unless it be shown that he has been prejudiced thereby; for instance, by the failure of the banker on whom it is drawn. In all other respects a check is precisely like an inland bill of exchange. Mr. Grant is in error when he supposes that the negotiability of inland bills of exchange rested entirely on the statute 9 & 10 W. 3, c. 17. It reposes on the law merchant, as it had been understood and applied for at least a hundred years before the passing of that statute. Bills of exchange indorsed in blank, and promissory notes payable to bearer, were well-known instruments. So, the bonds and notes of foreign States and princes are all treated in this country as negotiable instruments, and are available in the hands of persons taking them for value. That being so, it seems to me to be clear that a check falls within the class of ordinary bills of exchange; and, if so, why may it not be indorsed, so as to impose upon the indorser the ordinary liabilities which flow from the indorsement of a negotiable instrument? No inconvenience can result from our holding this; for, it was distinctly decided in *Waynam v. Bend*, 1 Camp. 175, that, in an action against the maker of a promissory note payable to A B or bearer, if the declaration states that A B indorsed the note to the plaintiff, the indorsement — that is, an indorsement *animo indorsandi* — must be proved. So, in *Story on Promissory Notes*, § 132, it is said that, “Although a note payable to bearer is transferable by mere delivery, it may also be transferred by indorsement of the payee, or of any other subsequent holder. In such a case, the indorser incurs the same liabilities and obligations as the indorser of a negotiable note payable to order, from many of which, in the case of a mere transfer by delivery, he is exempt.” It is true that a man's name may and very often is written on the back of a check or bill without any idea of rendering himself liable as an indorser. Indeed, one of the best receipts is the placing on the back of the instrument the name of the person who has received payment of it. Such an entry of the name on the instrument is not an indorse-

ment. So, a man frequently puts his name on the back of a bank-note. In all these cases, the act of writing may or may not be an indorsement, according to circumstances. All that we mean to decide on the present occasion is, that, where a man indorses an instrument of this sort, *animo indorsandi*, and delivers it so indorsed to a third person, he renders himself liable to be sued upon the instrument, as indorsee, by any subsequent holder. I entertain no doubt whatever upon the subject; and I do not think any mischief or inconvenience can result from our so deciding. I may add that I do no injustice to the able argument of Mr. Gran when I observe that it would have been deserving of more attention if it had been addressed to the Court a hundred years ago.

KEATING, J. I also am of opinion, upon all the authorities, that a check is an instrument which is capable of being indorsed, and that the payee, if he indorses it with intent to make himself liable as an indorser, as is alleged in this declaration, is chargeable as such at the suit of any subsequent *bona fide* holder.

Judgment for the plaintiff.

In *Harker v. Anderson*, 21 Wend. 372, Cowen, J., maintained the doctrine, in an elaborate opinion, that checks were to all intents and purposes bills of exchange payable on demand, the particular point argued by him being that the drawer of a check could always require the same diligence of the holder as to presentment and notice, as the drawer or indorser of a bill. But a majority of the Court expressed no opinion on the point so extensively discussed; and the weight of authority is against the view taken by that eminent judge. In several later cases in New York, the view taken by Mr. Justice Cowen, has been rejected. See *Little v. Phoenix Bank*, 2 Hill, 425; *Woodruff v. Merchants' Bank*, 6 Hill, 174. In the former case the question was, whether mere delay in presenting a check for payment would discharge the drawer. The Court held that it would not, unless the drawer had been injured thereby; but that it was incumbent upon the holder to show affirmatively that no loss had happened to the drawer. Mr. Justice Cowen, however, adhered to his former opinion in *Harker v. Anderson*, *supra*, that a check, like a bill, must be presented within a reasonable time, or both the drawer and indorser will be discharged.

This question is also ably discussed in *Matter of Brown*, 2 Story, 502, in which Mr. Justice Story disapproves the doctrine of Judge Cowen in *Harker v. Anderson*, *supra*.

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BENJAMIN B. MUSSEY v. PRESIDENT, DIRECTORS, &C., OF THE
EAGLE BANK.

(9 Metcalf, 306. Supreme Court of Massachusetts, March, 1845.)

Certification of checks. Inherent power of teller.—Evidence that the teller of a bank, during all the time of his holding office, whenever the convenience of the bank or of its customers required it, certified that checks were “good,” which were drawn on the bank by its customers, when funds to the amount of such checks were to the credit of the drawers, and that his so doing was, in some instances, known to the bank, and was not forbidden, and that it was the usage of the tellers of other banks to do the same thing, does not warrant a jury to infer that the power of so doing was an original, inherent, implied power of the teller, as such.

Usage. The usage of issuing certificates of deposit, by a teller of a bank, is not evidence to prove a usage of certifying checks.

A teller of a bank, as such, has no authority to certify that a check is “good,” so as to bind the bank to pay the amount thereof to any person who may afterwards present it; and a usage for him so to certify a check, to enable the holder to use it at his pleasure, is bad.

ASSUMPSIT to recover the amount of a check drawn on the Eagle Bank by G. F. Cook & Co., for \$4000, payable to the drawers or bearer, and on which the following words were written by the teller of the bank: “Good. H. B. Odiorne, Teller.”

HUBBARD, J. It is proved that Cook & Co. had no deposit to their credit, in the Eagle Bank, at the time the check was drawn, nor when it was presented for payment; and it is admitted that the action cannot be maintained against the defendants, unless the word “good,” written by their teller, and certified by his signature, binds the bank. It is also agreed, or proved, that the teller had no direct authority conferred upon him to certify checks as good. Unless, therefore, a teller has power, by virtue of his office, thus to bind the bank; or a custom thus to certify checks exists among banks, for the purpose of giving them currency with third persons, on the credit of the bank; or the defendants have sanctioned the practice of the making of such certificates, by their knowledge of its use, which they have not forbidden; this action, it is admitted, cannot be sustained.

These several propositions embrace, substantially, the subjects which have been discussed, and upon which the plaintiff grounds his motion for a new trial. One of the propositions of the plain-

tiff's counsel is stated thus: That the jury should have been instructed, that if the proof should warrant the inference that Odiorne, while teller, certified the checks of the customers of the bank, and this was, in any instance, known to the bank, and was not forbidden; and that, during the same period, it was the custom of all the tellers of other banks so to certify checks; the jury would be at liberty to infer an original, inherent, implied power in Odiorne, as such teller, thus to certify checks. But certain facts are stated, in this proposition, as furnishing evidence of inherent power, which are rather applicable to the question and binding nature of a usage. They may prove the latter, while they by no means establish the former. The question of inherent power, and that of usage, should be separately considered, in order to arrive at a correct conclusion.

1. And first, has the teller of a bank an original, inherent, implied power to certify checks as good, by virtue of his office? Or, in other words, has the teller of a bank an inherent power to bind the bank to the payment of any given sum of money, at a future time, to any person who shall produce a check, which he has, by writing upon it the word "good," in fact accepted to pay? Because, unless the word "good" carries with it binding evidence of the fact that the money is in the bank to meet that particular check, and that it will be paid to the bearer at any time when it is presented, it is of no practical utility. It will amount to no more than this; viz., that, at the moment of presentment, the check is good, and will be paid, if then handed in; but not that it will continue good two hours after, if, not being offered, other checks of the same drawer are presented, to the amount of his deposit in the bank.

The office of the teller is implied in the word used to designate it, — to tell or count the moneys of the bank, which are received or paid out. The office is often divided into two branches: that of receiving teller and of paying teller, where the business of the bank is large, and the duties cannot conveniently be united in one person. When united, the duty of the teller is, to receive all moneys offered at the bank in payment of notes and bills previously discounted or lodged for collection, as they severally fall due, and all moneys offered by customers of the bank, to be deposited to their credit in account, whether arising from moneys brought by them to the bank, or the proceeds of discounts made

for them ; to pay the checks of depositors, as the money is, from time to time drawn out, or for notes discounted ; and to redeem the bills of the bank with specie, when the same is demanded. This is his official employment ; and, in the discharge of these duties, he is regularly to account for the moneys he has received and paid out, not only to prevent mistakes, but to charge him when short or delinquent ; and he is also made responsible for the payment of a check, when the drawer has not a like amount to his credit, unless he applies to the book-keeper for information as to the state of the drawer's account ; and then, if an over-payment is made, through the mistake or fault of the book-keeper, he, and not the teller, is responsible for the loss. And when checks on other banks are received in payment, or on deposit, (as is the usage among the banks in the city), it is made his duty to attend to their collection by a given hour of the day. These are the powers and duties usually assigned to the office of the teller ; and they are plain and explicit. They relate to the direct receipt or payment of moneys, and to a true and accurate accounting for such receipts and payments. His duties respect the daily cash transactions of the bank, and they do not relate directly to the *credits given* by the bank to its customers, or borrowers, on the loan of its funds. His office is not confounded with that of the discount clerk, or the book-keeper ; but his daily minutes, and the checks paid or received by him, are handed to the book-keeper, for him to make the proper entries, by which the concerns of the bank may be known when tested by the teller's cash on hand.

In these powers and duties, thus conferred upon the teller, and to be exercised by him in the discharge of the appropriate functions of his office, there is no inherent, original power, expressly conferred, to enable him to certify that the checks of the depositors at the bank will be good, when presented for payment, at some future time ; nor is such power incident to, or necessary to, the faithful discharge of any of his duties. Powers which are neither incidental nor necessary are not to be implied, when the rights of others are thereby involved. The power in question is, in fact, not only not implied as incidental to the proper performance of the duties of the office, but the teller is not a regular certifying officer, as to the state of any depositor's account ; for he has not the means of certifying it. Nor is he responsible for the book-keeper's statement. Nor does such

power exist in the book-keeper; for, during the business hours of the day, he is not the receiver of all the checks drawn by the depositors, as they are paid at the bank, nor is he answerable for the amount, until handed to him for entry in his books. Such certificate would, in fact, require the names of both the officers, that the drawer's account was good for the face of the check, before either of them could have evidence of the fact to be certified. Nor could they be secure from difficulty arising out of the constant pressure of business, without actually charging the check thus certified; and even if charged, they would be without a voucher till the check should be handed in for payment.

Such a power of certifying is, in fact, a power to pledge the credit of the bank to its customers; a power which, by the constitution of a bank, can alone be exercised by its president and directors, unless specially delegated by them; and consequently, it cannot be implied as a resulting duty or authority in any individual officer. Evidence of usage, therefore, can imply no original, inherent, and implied power in tellers thus to certify, however it may bear on the question of binding a bank by the allowance of such a usage.

2. It is contended that a usage for tellers of banks thus to certify that checks are good, and such usage being known to the business community, is a usage binding on banks, and that the holder of a check so certified may recover it from the bank on which it is drawn; and that proof of a usage, on the part of this bank and the other banks of the city, to allow certificates of deposit to be certified by their respective tellers, is evidence in support of a usage of such tellers to certify checks, or of their authority so to do.

Upon this point, the judge, at the trial, instructed the jury, that if any such general usage existed, and if it was a good usage, the defendants would be bound by it; but whether the usage was good or not, was matter of law for the Court to decide, and was not a question for the jury; and that a usage to issue certificates of deposit was not evidence to prove a usage of certifying checks.

In examining the evidence which was offered to the jury, and which is reported at some length, we are well satisfied that no such general usage has been proved; but that, in some of the banks a practice has existed for one of the officers of the bank,

and generally the teller, to certify that the check of a depositor is good, when it was necessary for him to use his check at another bank, after bank hours, to prevent the protest of a note ; in which case his check would, of course, be presented for payment, the next morning, by the bank receiving the same ; or occasionally, when a remittance was to be made to a correspondent at a distance ; and sometimes, for the convenience of the officers, where the money was needed, to be paid at another bank, and the amount of the check was large, to save the labor of counting the bills. The cases vary from the one at bar. They were evidently those of special convenience for a particular occasion, and which, from the uprightness of the officers and the solvency of the parties, worked no mischief. But even these cases were neither proved to be general, nor applicable to all the banks, so as to establish a usage. The case at bar, on the other hand, was the giving of large credits to the persons drawing the checks, to enable them to borrow money on the strength of the certificates. In some banks, checks were occasionally certified for customers, to be used by them, at their convenience, where the funds were in the bank to meet them ; but the practice, as proved, was of such limited extent as not to bear on the question of usage.

But if a usage had been proved of the certifying, by the teller, that the check is good, to enable a holder to use it afterwards, at his pleasure, we are clearly of opinion that such a usage would be bad, and could not be upheld. It would give to bank-checks, which are intended for immediate use, and are the substitutes for specie, in the ordinary transactions of business, the character of bills of exchange, payable to the bearer, the bank being acceptor, and payable at an indefinite time. It would lead to loans to favored individuals, without the usual security ; it would substitute checks for cash, in the hands of tellers who receive them, and would confer the power upon a single officer to pledge the credit of the bank by the mere writing of his name ; a power never contemplated by the legislature, nor intended to be conferred by the stockholders. It would expose the teller to the frauds of a book-keeper, and both of them to the temptations of unprincipled and greedy men, who might, under various pretences, procure their checks to be thus certified, in the first instances, when their deposits were good, and afterwards, when

there was no balance to their credit ; allowing interest, as a bonus for the certificate, to the certifying officer, who would afterwards receive such checks as cash. And the present case well illustrates the hazards and the evils to which banking companies and their officers are exposed by the allowance of such a practice.

It has been pressed, in the argument on the subject of usage, that this certificate of "good," on the check, is but another form of the exercise of a usage, so common in banks, to grant, by the teller, a certificate of deposit of money to the credit of a third person. But we are of opinion, with the judge before whom the trial was had, that usage of the one will not support the practice of the other. The two practices, while having the appearance of resemblance, and although one may be used for the same purpose as the other, in the form of a remittance, are, in their character, essentially distinct. A certificate of deposit is regularly issued only when money is actually paid into a bank, for the benefit of a third person, and is placed to his credit ; by means of which certificate, and on the return thereof, he can draw for the money deposited ; or, if the money is not actually deposited, but the check of the party procuring the certificate is given, such check is immediately charged to the account of the drawer. This is a transaction in which money is actually paid for the certificate ; and the certificate is no more than entering the amount in the depositor's bank-book. The difference is, that the credit is given to the correspondent of the depositor, and not to the depositor himself. But where a check is certified, as in the case at bar, no money is deposited, no check is received, and the teller can only rely on the declaration of the book-keeper that the check is good. The transaction enters not into the books of the bank ; is not necessarily known by its higher officers ; and yet, it is contended, the bank is bound by the transaction.

In examining the evidence, it is apparent that the defendants have never sanctioned the practice of authorizing their teller to certify checks as good, in order to their being used, by the drawer, to raise a credit with third persons. And, admitting it to be proved (though of that we are not satisfied), that the cashier, in one instance, knew that the teller certified a check of Cook & Co. as good, and did not prohibit him, still, the teller having

no legal right, either express or implied, thus to obligate the bank, the knowledge of the cashier could not affect the defendants. Such an acquiescence on the part of the cashier, whether the consequence of haste, or ignorance, or improper motive, or a mistaken view of his own powers, could not create a contract between the bank and the holder of any other check thus certified.

What the legal consequence would be, if the check was good at the time of such certificate, and was certified with the knowledge and acquiescence of the cashier, and was taken, *bona fide*, on the faith of such certificate so approved, we are not now called upon to express an opinion.

The view taken of the case makes it unnecessary to decide on that part of the instructions of the presiding judge, whether Drake took the check under such suspicious circumstances that he was bound to make inquiry. Leaving this subject, therefore, for future consideration, if the point should hereafter arise, we are satisfied that the instructions were sufficiently favorable to the plaintiff, and that there is no just cause for disturbing the verdict.

Judgment on the verdict.

But see the following case and note.

THE FARMERS' AND MECHANICS' BANK OF KENT COUNTY,
MARYLAND, v. THE BUTCHERS' AND DROVERS' BANK.

(16 New York [2 Smith], 125. Court of Appeals, September, 1857.)

Certification of checks.—A *bona fide* holder, for value, of a negotiable check certified to be good by the paying teller of the bank on which it is drawn, whose authority to certify is limited to cases where the bank has funds of the drawer to meet the check, can recover of the bank the amount of the check, though the drawer had no funds in the bank, and though the certification by the teller was in violation of his duty, and for the drawer's accommodation.

THE action in this case was to recover the amount of five checks drawn upon the defendants, by one Green, and certified to be good by the paying teller of the defendants. The checks were not drawn on funds, and the teller had no authority to certify checks unless the drawer had funds in the bank to cover them.

The plaintiffs were *bona fide* holders for value, and had judgment in the Court below.

SELDEN, J. The jury in this case have found, upon sufficient evidence and under proper instructions from the Court, that the plaintiffs were holders, for value, of the checks in question. Each of these checks, if duly certified, imposes upon the bank an obligation to retain the amount for which the check is drawn, and which, by the certificate, it admits it has in hand to the credit of the drawer to meet the check when presented, and to pay the same to the holder on demand. This obligation is substantially the same as that assumed by the acceptor of an ordinary bill of exchange; and the certificates in this case, if authorized, may with propriety be regarded as virtual acceptances of bills, and the bank as liable, if at all, as acceptor.

The first ground upon which this liability is resisted is based, not upon any want of authority in the particular agent by whom the checks were certified, but upon a want of power in the bank to bind itself by the contract sought to be enforced. It is insisted that the bank was not authorized by its charter to engage in transactions purely fictitious, having no connection with its legitimate business, or to pledge its credit for the mere accommodation of third persons.

The defendant is a banking corporation, organized under the general banking law of this State; and it is, I think, a sound position, that such a corporation exceeds its powers when it becomes the mere surety for another, upon a contract in which it has no interest, or lends its credit in any form for the exclusive benefit of other parties. Such a contract is *ultra vires*, and cannot be enforced against the bank by any person cognizant of the facts. But it by no means follows, when the unauthorized contract is in the form of a negotiable instrument, that the bank can avail itself of the defence, as against one who, without notice, has become the holder of the paper for value. This question appears to have arisen in the case of *Stoney v. The American Life Insurance Company*, 11 Paige, 635, and the decision of the Court upon the point is thus stated by the reporter: "A negotiable security of a corporation, which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the corporation, and in violation of the laws of the State where it was actually issued."

There is a *dictum* of the chancellor, to the same effect, in the case of *Safford v. Wyckoff*, 4 Hill, 442, where the defence set up was, that the act of the bank, in issuing the bill upon which the action was brought, was *ultra vires*. The chancellor there says: "A bill, or any other negotiable security, which is not upon its face illegal and unauthorized, is valid in the hands of a *bona fide* holder, without notice, who has paid a valuable consideration therefor, except in those cases in which the security is made void by statute." So in the case of *The Genesee Bank v. The Patchin Bank*, 3 Kern. 309, recently decided by this Court, a similar doctrine is distinctly asserted by *Denio, J.*, although the point was not passed upon by the Court.

I have no hesitation in concurring with these learned judges in the principles thus asserted, and am not aware that a contrary opinion has ever been judicially expressed. A citizen who deals directly with a corporation, or who takes its negotiable paper, is presumed to know the extent of its corporate power. But when the paper is, upon its face, in all respects such as the corporation has authority to issue, and its only defect consists in some extrinsic fact, such as the purpose or object for which it was issued, to hold that the person taking the paper must inquire as to such extraneous fact, of the existence of which he is in no way apprised, would obviously conflict with the whole policy of the law in regard to negotiable paper. I pass, therefore, to the consideration of that branch of the defence which rests upon the want of authority in Peck, the teller, to bind the bank.

In the case of *Mussey v. Eagle Bank*, 9 Met. 306,¹ the Supreme Court of Massachusetts held not only that such a teller had no original inherent power to certify checks, but that a general custom to that effect among banks would conflict with the public interests, and would be bad. I am not entirely satisfied with the reasoning of the Court in that case. The act of certifying a check is simply answering the supposed inquiry of one about to take the check, whether the bank has funds of the drawer to meet it; and no other officer or agent of the bank would seem to be so competent to give the answer as the paying teller. His duties impose upon him the necessity of knowing the state of every depositor's account. He is charged with all he pays out, and if he pays a check, without funds in hand, he is responsible to the bank for the amount. His knowledge exceeds that of the book-keeper, because, to the information obtained from the latter, he adds a knowledge whether

any deposits have been made or checks paid since the last entry in the books. No doubt the cashier, by virtue of his general powers, and his presumed knowledge of all the affairs of the bank, would be competent to answer the question ; but he could only do so by first inquiring of the book-keeper and teller. Why should the applicant be compelled to seek the information through this circuitous channel, instead of going directly to the ultimate source of knowledge on the subject ? The teller is put in the place of the cashier, to perform a portion of his duties. His appointment is virtually a division of the office of cashier ; and that branch of the office which the teller fills embraces those duties which particularly require a knowledge of the state of the accounts of the depositors. Why then should he not be the organ of communication on that subject ?

But it is unnecessary in the present case to decide this question, as it clearly appears not only that the teller, Peck, was in the habit of certifying the checks of customers, with the knowledge of the officers of the bank, but that he was furnished with a book for the express purpose of keeping a memorandum of such checks. His authority to certify, therefore, in a proper case, cannot be disputed. But it is insisted that his power extended only to cases where the bank had funds in hand, he having been expressly prohibited from certifying in the absence of funds, and hence that the bank is not bound.

It may be doubted whether such a prohibition adds any thing to the restrictions which would otherwise exist upon the powers of the agent. A teller, acting under a general power to certify checks, would be guilty of an excess of authority, and a clear violation of duty, if he certified without funds.

The powers of the cashier himself, or other principal financial officer of the bank, would no doubt be subject to the same limitation. To certify a check, when the bank has no funds to meet it, is to make a false representation ; and neither the incidental power of the cashier, nor a general power conferred upon any other officer, could be construed to authorize that. Hence, if a bank is holden, in any case, upon a certificate of its cashier that a check is good, when it has no funds of the drawer, it is not because the cashier is deemed authorized to make such a certificate, but because the bank is bound by his representation, notwithstanding it is false and unauthorized.

It would seem, therefore, that the defence insisted upon here

would have been equally available if the checks in question had been certified by the cashier himself. It might then have been urged, with truth, that the cashier had violated his duty and exceeded the proper limit of his powers in making the certificate; and if the argument be sound, that the principal is in no case bound, unless the act of the agent is within the powers either actually or apparently conferred upon him, the bank would not be holden in such a case. It is no more within the apparent power of a cashier to certify that the bank has funds, when it has none, than it is within that of a teller expressly authorized to certify only when the bank has funds. Every person would be bound to take notice of the limitation imposed by law upon the powers of the cashier, or other general agents, no less than of that which is in terms imposed upon the powers of the teller as special agent. Hence, it cannot be pretended that a person who should take and pay value for a check, with knowledge that the bank had no funds of the drawer to meet it, would acquire any valid claim against the bank, although such check was certified by the cashier himself. He would be presumed to know that it was contrary to the duty of the cashier to certify without funds, and this knowledge would have the same effect as that which every one who should take a check, certified by the teller, would be presumed to have of any express restriction upon his powers.

It will be seen that, if these views are correct, the present case does not turn in any degree upon the rules applicable to special agencies, but that the question would have been precisely the same if the check had been certified by the cashier or other principal financial officer of the bank. As they may, however, admit of doubt, I shall treat the case as one of an agency specially restricted, and shall simply inquire whether a *bona fide* holder, for value, of a negotiable check, certified by a special agent whose authority is limited to cases where the bank has funds of the drawer in hand, can enforce payment of the check, provided the bank has no such funds.

This is a complex question, depending partly upon the law of principal and agent, and partly upon that of negotiable or commercial paper. The defence assumes that principals are bound only by the authorized acts of their agents, and admits of no qualification of this general rule, except where the agent has been apparently clothed with an authority beyond that actually conferred. But this proposition is too broad to be sustained. Principals have been repeatedly held responsible for the false representations

of their agents, not on the ground that the agents had any authority, either real or apparent, to make such representations, but for reasons entirely different. In *Hern v. Nichols*, 1 Salk. 289, the leading case on the subject, where an agent authorized to sell a quantity of silk had made certain fraudulent representations, by which the purchaser was deceived, the principal was held liable. Lord *Holt* there said: "Seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and *puts a confidence* in the deceiver should be a loser, than a stranger." The principle of this case has never, I think, been overruled, but, on the contrary, has been repeatedly approved and confirmed. It will be found directly applicable to the present case. The certificate of the teller is a positive representation that the bank has funds to meet the check. If that representation is false, who ought to bear the loss?

The reasoning of Lord *Holt*, in the case of *Hern v. Nichols*, applies here with peculiar force. The bank selects its teller, and places him in a position of great responsibility. The trust and confidence thus reposed in him by the bank leads others to confide in his integrity. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank, and within the scope of his employment, so far as is known or can be seen by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be held responsible? It is worthy of consideration that the fact misrepresented in this case is not only one peculiarly within the knowledge of the agent, but one with which he is made acquainted by means of the position in which he is placed by the bank, and which it is his especial province and duty to know, and which could scarcely be definitively ascertained except by application to him. These circumstances would seem to bring the case decidedly within the principles adopted in *Hern v. Nichols*, and in the subsequent decisions based upon that case.

This conclusion is in no respect in conflict with that doctrine of the law of agency which makes it the duty of all persons dealing with a special agent to ascertain the extent of his powers. It is conceded that every one taking the checks in question would be presumed to know that the teller had no authority to certify without funds. But this knowledge alone would not apprise him that the certificate was defective and unauthorized. To discover that, he must not only have notice of the limitations upon the powers

of the teller, but of the extrinsic fact that the bank had no funds ; and as to this extrinsic fact, which he cannot justly be presumed to know, he may act upon the representation of the agent. There is a plain distinction between the terms of a power and facts entirely extraneous, upon which the right to exercise the authority conferred may depend. One who deals with an agent has no right to confide in the representation of the agent as to the extent of his powers. If, therefore, a person, knowing that the bank has no funds of the drawer, should take a certified check, upon the representation of the cashier or other officer by whom the certificate was made, that he was authorized to certify without funds, the bank would not be liable. But in regard to the extrinsic fact, whether the bank has funds or not, the case is different. That is a fact which a stranger, who takes a check certified by the teller, cannot be supposed to have any means of knowing. Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge, and he already has his written representation upon the face of the check. If, therefore, one who deals with an agent can be permitted to rely upon the representation of the agent as to the existence of a fact, and to hold the principal responsible in case the representation is false, this would seem to be such a case.

It is, I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it. The familiar case of the giving of a negotiable partnership note, by one of the partners, for his own individual benefit, affords an apt illustration of this rule. Each of the partners is the agent of the partnership, as to all matters within the scope of the partnership business, and can bind the firm by making, indorsing, and accepting bills and notes in such business ; but he has no more authority than a mere stranger to execute such paper in his own business, or for the accommodation of others. If he gives the partnership note or acceptance for his own debt, it is void in the hands of any party having knowledge of the consideration for which it is given ; but when negotiated to a *bona fide*

holder, the firm is precluded from questioning the authority of the partner, and is effectually bound. The cases in this State by which this doctrine is illustrated and established are numerous and uniform. *Livingston v. Hastie*, 2 Caines, 246; *Lansing v. Gaine*, 2 Johns. 300; *Laverty v. Burr*, 1 Wend. 529; *Williams v. Walbridge*, 3 id. 415; *Boyd v. Plumb*, 7 id. 309; *Gansvoort v. Williams*, 14 id. 133; *Joyce v. Williams*, id. 141; *Wilson v. Williams*, id. 146; *Catskill Bank v. Stall*, 15 id. 364; s. c., 18 id. 466.

It will be found difficult to distinguish these cases, in principle, from that now before the Court. Every person taking the negotiable note or acceptance of a partnership, executed by one of the partners in the name of the firm, is bound to know the extent of the partner's authority to bind the firm; but this obligation does not extend to the consideration for which the note or acceptance was given. If given for the private debt of one of the partners, or for the accommodation of third persons, all the cases agree that the burden of proving the holder's knowledge of that fact rests upon the partnership. That the execution is by an agent is as apparent upon the face of the paper, in such cases, as in that of a certified check; because a partnership can only act in its partnership name through agents.

The argument resorted to here, therefore, that parties are only bound by the authorized acts of their agents, and that paper issued by an agent without authority is no more obligatory upon the principal than if it had been forged, is just as applicable to partnership notes given by a partner for his individual debts as to these certified checks. The question is not, in such cases, whether the principal is bound by the unauthorized act of the agent, but whether he is estopped by the representation of the agent, from disputing facts which show that the act was authorized. There is no analogy between these partnership cases, or the case before the Court and cases where the paper is forged. The fact of the agency, and the trust and confidence reposed by the principal in the agent, create a broad line of distinction between them; and it is this trust and confidence which constitute the foundation of the liability, and which justify the party dealing with the agent in relying upon his representation in respect to facts especially within the agent's knowledge. The giving of a note in the partnership name, by one of the partners, is a virtual representation that it is given in the partnership business, and, if negotiable, this repre-

sentation is deemed in law to have been made to every subsequent *bona fide* holder of the note. The State of Illinois *v.* Delafield, 8 Paige, 527; s. c. in error, 2 Hill, 159, is another illustration of the same principle. An agent of that State was authorized to dispose of certain bonds, but was not to sell them below par or on credit. He sold them to Delafield on time and at a sacrifice. The State filed a bill against Delafield for relief, and applied to the Court of Chancery for an injunction to restrain the defendant from negotiating the bonds, on the ground that if negotiated the State would be liable to pay them. The defendant's counsel insisted that if the bonds were void in the hands of Delafield they would be equally so in the hands of any person to whom he might transfer them. The chancellor, nevertheless, granted the injunction, saying that, if the securities should pass into the hands of a *bona fide* holder, the State would be equitably and legally bound to pay them. On appeal to the Court for the correction of errors, the decision of the chancellor was affirmed by a nearly unanimous vote.

It would be difficult, I think, to discover any valid distinction, in principle, between this case and the one we are considering. The purchaser of the bonds from Delafield would, equally with Delafield himself, be presumed to know the limits of the authority conferred upon the agent; but it must have been held that he would not be bound to inquire as to the extrinsic facts attending the sale or negotiation of the bonds.

The principle is well stated in the following proposition, submitted to and approved by the Court, in the case of *The North River Bank v. Aymar*, 3 Hill, 262: "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde*; the apparent authority is the real authority."

The opinion of Mr. Justice *Nelson*, who dissented from the majority of the Court in this case, cannot be reconciled with the principle maintained by the same judge in *Boyd v. Plumb* and *Gansvoort v. Williams*, *supra*. The cases are strictly parallel. In that of *Aymar*, the power of the attorney was limited to the giving of notes, for the use of the principal; in the others, the authority of the partner was limited to the execution of paper, for

the use and benefit of the partnership ; in both, the plaintiffs were regarded by the judge as equally cognizant of the limitations of the power ; and yet, in the cases of *Boyd v. Plumb*, and *Gansvoort v. Williams*, he held that the burden rested upon the defendants to prove notice to the plaintiff that the paper was not given in the business of the partnership ; while in the case of *Aymar* he held that the plaintiffs were presumed to know that the notes were not given for the benefit of the principal, and that the burden of proving the contrary rested upon them. These two positions are diametrically opposed and cannot be made to harmonize ; that taken in *Boyd v. Plumb* and *Gansvoort v. Williams* accords with many other cases in this State, and with all the English cases on the subject.

It is true that the decision in the case of *The North River Bank v. Aymar* was reversed in the Court of Errors ; but the opinions pronounced in that Court have never been published, and consequently the views there expressed upon the point in question are unknown. Under these circumstances the principal reason against the reconsideration of a question, which has been passed upon by the Court of last resort ; viz., that the public needs a fixed and definite rule upon which it can rely in the transaction of business, loses most of its force. The opinion of the Supreme Court, which is published at large in the reports, is more likely to be taken as the rule than that of the Court of Errors, to which attention is rarely directed. The question, therefore, should, I think, be considered as still open for examination ; and I have little hesitation in holding that it was properly decided by the Supreme Court.

It is supposed that the cases of *Attwood v. Munnings*, 7 Barn. & C. 278, and *Alexander v. McKenzie*, 6 Mann. Gr. & S. 766, are in conflict with the doctrine here advanced ; but, upon a careful scrutiny of the first of these cases, it will be seen that, if the point we are examining was involved, it received no consideration from the Court. The general principle laid down in that case is in perfect accordance with the views here expressed. It is, simply, that where an agent accepts a bill, in a form which imports that he acts by virtue of a special power, any person taking the bill is bound to inquire into and is chargeable with knowledge of the terms of the power. This is not denied. But the question is, whether, after inquiring into the terms of the power, and ascertaining, so far as can be done by comparison, that the act of the

agent is within the power, he is chargeable, without proof, with a knowledge of extrinsic facts, which show the act to be unauthorized.

This question, which is the only one which arises here, was not decided, or even adverted to, in *Attwood v. Munnings*. The report of that case shows that the plaintiffs neglected even to call for the production of the power, to which they were expressly referred by the terms of the acceptance, and for this culpable negligence they are held responsible by the Court. Justice *Bailey* says: "A person taking such a bill ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority."

It seems to have been taken for granted that, if the plaintiffs had informed themselves as to the terms of the power, they would of course have ascertained the object for which the bill was drawn, and the relation existing between the drawer and the defendant. Indeed, for aught that appears in the report of the case, it may have been shown upon the trial that they were actually apprised of these facts. The case therefore is no authority, except for the undeniable proposition that one who deals with an agent, knowing that he acts by virtue of a special power, is bound to inquire into and ascertain the precise terms of such power.

The case of *Alexander v. McKenzie* has even less bearing upon the point. The report of the case, which is very imperfect, does not show the terms of the special power nor the nature of its limitations. All that the case decides is, that the words "per procuration," affixed to an indorsement or acceptance by an agent, import that the agent acts by virtue of a special power, and are sufficient to charge any one who takes the bill with knowledge of the precise terms of such power. The plaintiff in this case as in that of *Attwood v. Munnings*, *supra*, had neglected to call for the production of the power, and no attempt was made to show that the indorsement corresponded with its terms. The plaintiff relied mainly upon the fact that the bank had paid two other bills indorsed in the same manner. The case, taken as a whole, is a somewhat obscure assertion of the same principle which was adopted in *Attwood v. Munnings*; viz., that one who takes a bill, so indorsed, is bound to require the production of the special power,

and to ascertain by comparison that the bill and indorsement correspond in all respects with its terms.

The cases of *Grant v. Norway*, 10 Com. B. 70 Eng. C. L. 665; *Coleman v. Riches*, 29 Eng. L. & Eq. 323; and the *Mechanics' Bank v. The New York and New Haven Railroad Company*, 3 Kern. 599, are plainly distinguishable from the present case. In neither of those cases was the document upon which the question arose negotiable. It was sought there to make the principal responsible for a false representation of the agent, not to the person to whom the representation was made, but to one with whom the agent had no dealings, and to whom he had made no representation. Upon a careful examination, it very plainly, I think, appears that this was the real obstacle to a recovery in each of these cases. When Sergeant Crowder, counsel for the plaintiffs in *Grant v. Norway*, cited the case of *Hern v. Nichols*, and invoked the doctrine there laid down by Lord *Holt*, Justice *Cresswell* replied: "There the factor entered into a contract with the plaintiff for his employer. Here you are a step further off. You say your agent, with whom I made no contract, has enabled a man, with whom I did contract, to cheat me."

This remark presents, in my judgment, the turning point of the case, and the only obstacle to the plaintiff's recovery, viz., the want of any privity of contract between the plaintiff and the agent. This obstacle was precisely that which the negotiability of the instrument, if established, would have removed; because the maker of a negotiable instrument is deemed in law to enter into a contract with every one to whom it is afterwards negotiated; and where the instrument is made by an agent it is in this way only that privity of contract can be established between such agent and the subsequent holders, without which the principal can never be held responsible for the false representations of the agent. Hence it is that we find the counsel for the plaintiffs in the cases of *Grant v. Norway*, and the *Mechanics' Bank v. The New York and New Haven Railroad Company*, *supra*, contending so strenuously for the negotiability of the documents in question in those cases.

That the want of privity of contract, between the agent and the party seeking to hold the principal responsible, constituted the real difficulty in those cases is also apparent from the report in the case of *Coleman v. Riches*, *supra*, which belongs to the same class.

There Bond, the agent of Riches, had given a false receipt, not to the plaintiff, but to Lewis, and Lewis had exhibited this receipt to the plaintiff and obtained money upon it. The difficulty in the case was to show the relation between the parties to have been such that the misrepresentation by Bond to the agent might properly be considered as made by him to the plaintiff. To establish this, the counsel for the plaintiff relied upon a course of dealing, which, as he alleged, was known to the defendant. To this the chief justice answered: "I cannot see how the knowledge by Riches of the course of business, according to which Coleman paid on the production of the receipt, would make the showing of the receipt by Lewis, even in Bond's presence, a representation by Riches" (*i. e.*, by the agent of Riches); and Justice *Williams* adds: "Suppose Riches himself had given the fraudulent receipt, would that have constituted a representation by Riches to Coleman?" Upon the same argument being afterwards repeated, Justice *Cresswell* said: "There is the vice of the argument; I do not find any evidence of such course of dealing between the plaintiff and the defendant. The course of dealing proved, was that which existed between the plaintiff and the vendors and not between the plaintiff and defendant."

It seems impossible to mistake the purport of these remarks. They show that the difficulty in the way of a recovery, in this case, was that no privity of contract was established between Riches, or his agent, Bond, and the plaintiffs, by means of which the misrepresentations made by Bond could be considered as made to the plaintiffs. Had the receipt been a negotiable instrument, a privity would have been established.

I entertain no doubt that had the stock certificates in question, in the case of *The Mechanics' Bank v. The New York and New Haven Railroad Company*, *supra*, been held to be negotiable, the plaintiffs would have prevailed; and such I understand to be the opinion of two of my associates who took part in the decision of that case.

The judgment of the Supreme Court should be affirmed.

Judgment affirmed.

Comstock, J., dissented.

The most recent case upon this subject sustains the New York doctrine as above declared. *Merchants' National Bank of Boston v. State National Bank of Boston*, Supreme Court of the United States, December, 1870. This case was one of the most important ever determined in America, both from the vast

amount of money involved, and the importance of the questions to be determined. It is proper to state that the cause was argued by some of the ablest counsel in the country; and it is to be hoped that for the sake of uniformity the rule now adopted respecting the national banks, in the highest court of America, may be generally accepted, and applied to all banking institutions. The opinion of the Court, in the above-named case, was delivered by

SWAYNE, J. This is a writ of error to the Circuit Court of the United States for the District of Massachusetts. The plaintiff in error was the plaintiff in the Court below. It appears, by the bill of exceptions, that upon the evidence in behalf of the plaintiff being closed, the defendant's counsel moved the Court to instruct the jury that it was not sufficient to warrant them to find a verdict for the plaintiff upon either of the counts in the declaration. This instruction was given. The jury found for the defendant. The plaintiff excepted, and has brought that instruction here for review. This renders it necessary to examine the entire case as presented in the record. . . .

On the twenty-sixth of February, 1867, Fuller, the plaintiff's cashier, received from the Second National Bank of Boston \$200,000 of gold certificates, and paid the bank, upon their delivery, the amount of their face, and a premium of twenty-five per cent. Payment was made in currency, and legal tender notes. The next day he received from the same bank \$200,000 more of like certificates, and paid for them at the same rate in currency, and a ticket of credit by the Merchants' Bank in favor of the National Bank for \$175,000. Both transactions were pursuant to an arrangement with Mellen, Ward, & Co., brokers, in Boston. The market premium upon gold at that time was forty per cent. It was understood between Fuller, the cashier, and Mellen, Ward, & Co., that the latter might receive the same amount of gold from the Merchants' Bank, at any time thereafter, by paying the amount advanced, compensation for the trouble the bank had incurred, and interest at the rate of six per cent. There had been like transactions upon those terms between the parties prior to that time. The president of the bank was consulted in advance as to both the purchases from the Second National Bank, and approved them. The following testimony is taken from the record:—

George H. Davis testified as follows: I am the paying teller of the Merchants' Bank. From about the first of January, 1867, and previous to the twenty-third of February, the bank several times received gold or gold certificates from Mellen, Ward, & Co., for which it paid currency at the rate of \$125 for \$100 in gold. At that time they had deposited in the bank about \$90,000 in gold. No note, memorandum, or check was taken connected with it in any way. The gold was added to the gold of the bank; on my cash-book it was added to the item of gold, and the gold was mixed with the gold of the bank in the vault. If it consisted of certificates, they were put in a pocket-book kept in my trunk with other certificates and bills. (The paying teller's book was put in, and from the entries in it on the twenty-sixth, twenty-seventh, and twenty-eighth of February, 1867, it appeared that the gold received from Mellen, Ward, & Co., was added to the gold of the bank.)

On the twenty-eighth day of February, Carter, of the firm of Mellen, Ward, & Co., and Smith, the cashier of the State Bank, called together at the Merchants' Bank. Carter said to Fuller, "We have come in for gold." Smith, the cashier,

said, "We have come to get an amount of gold," and that he would "pay for it by certifying these checks," referring to two papers which Carter held in his hand. The teller handed Fuller eighty-four gold certificates of \$5000 each, making the sum of \$420,000. Fuller announced the amount. Smith said that was the amount wanted, and the amount covered by the checks. He received the certificates, certified the checks, and handed them over to the plaintiff's cashier. They were drawn by Mellen, Ward, & Co., upon the State National Bank in favor of Fuller, the plaintiff's cashier, or order, and were certified "Good. C. H. Smith, cashier." One was for \$250,000, and the other for \$275,000. Smith thereupon left the bank with the certificates in his possession. Nothing was said by Fuller to Carter, or by Carter to Fuller, in relation to the checks, and Fuller did not know what checks Smith referred to until they were delivered to him. Smith did not certify or deliver the checks until he had got possession and control of the funds upon which his certificates were apparently founded, and this was known to the plaintiff's agent when he received the checks. Later, on the same day, Smith and Carter called again at the Merchants' Bank. Fuller was absent. Smith received \$60,000 more of gold and gold certificates from the teller, and gave in return a check for \$75,000, drawn by Mellen, Ward, & Co., on the State Bank, payable to "gold or bearer." Like the two previous checks, it was certified "Good. C. H. Smith, cashier." This arrangement was in pursuance of the same agreement as that under which the gold certificates were delivered in the earlier part of the day. Both transactions were alike within its scope.

On the first of March, Havens, the president of the Merchants' Bank, called at the State Bank and complained that Smith had not paid the checks. Smith said he was going out to get the money. Havens inquired, "Didn't you have the money, — the gold? Were not gold certificates delivered to you?" He answered, "Yes; I had them here, but they are not here now. I am going out to get it, and will come in and attend to it." Subsequently, in the same conversation, he said, "You hold the State Bank." Later in the day Havens called upon Stetson, the president of the State Bank. Stetson denied that Smith was authorized to certify the checks, and appealed to a director who was present. The director was silent. In an account which Fuller rendered to Mellen, Ward, & Co., after their failure, showing the disposition of various collaterals which Mellen, Ward, & Co. had deposited from time to time with the Merchants' Bank, the amount paid for gold was put down as a loan, and interest was charged; but in his testimony before the jury he denied that the money was loaned, and insisted that the gold was bought by the Merchants' Bank. The agreement between Mellen, Ward, & Co. and the Merchants' Bank, rested wholly in parol. No written voucher was given or received on either side touching any of the transactions between the parties. The record discloses nothing else in this connection which it is material to consider.

The State Bank was organized under the act of Congress "to provide a national currency," &c., of the third of June, 1864, 13 Stat. 99. The eighth section of that act authorizes such associations, by their directors, to appoint a cashier and other officers, and to exercise, "under this act, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and

bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes, according to the provisions of this act," &c. It is further provided that the directors may, by by-laws, regulate the manner in which its business shall be conducted and its franchises enjoyed; and that its general business shall be transacted at an office "located in the place specified in its organization certificate."

The fifth of the articles of association authorizes the board of directors to appoint a cashier and such other officers as may be necessary, and to define their duties. The seventh by-law declares that the cashier "shall be responsible for the moneys, funds, and other valuables of the bank, and shall give bonds," &c. The seventeenth by-law requires that all "contracts, checks, drafts, receipts, &c., shall be signed by the cashier or by the president, and that all indorsements necessary to be made by the bank shall be under the hand of the cashier or president," unless absent.

The by-laws contain nothing further upon this subject. The directors failed to define more specifically the powers and duties of the cashier.

Smith, the defendant's cashier, exercised habitually very large powers without any special delegation of authority. An account was kept on the books of the bank with him as cashier, which represented these transactions, and printed blank checks were kept in the bank to facilitate them. The checks given by him for the proceeds of bills discounted and for the purchase of exchange during the five months preceding the twenty-third of February, 1867, amounted in the aggregate to two and a half millions of dollars. This was exclusive of his clearing-house checks. His checks for money borrowed of other banks during the six months preceding the same twenty-third of February amounted to one million five hundred and forty-seven thousand dollars. A large number of the cashiers of other banks in Boston were examined, and testified that they exercised the same powers under like circumstances. There is no proof that either they or Smith ever certified checks. It is not shown what became of the gold. Perhaps some light is thrown on the subject by the remark of the president of the Merchants' Bank to the president of the State Bank, "that the latter had better go to the sub-treasury, and that he would perhaps find his gold there." We find no reason to doubt that both banks, as represented by their cashiers, acted in entire good faith throughout the transactions until they were closed by the delivery of the last of the certified checks. Neither could then have anticipated the difficulties and the conflict which subsequently arose.

The first question presented for our consideration is: What was the title of the plaintiff, and what were the rights of Mellen, Ward, & Co., in respect to the gold certificates delivered by the Second National Bank to the Merchants' Bank? No very searching analysis of the facts disclosed is necessary to enable us to find a satisfactory answer to this inquiry. It does not appear that Mellen, Ward, & Co., had any connection with the certificates received from the Second National Bank until after the plaintiff took the action which they invoked, and came into possession of the property.

The Merchants' Bank applied for them, bought them, paid for them, received them, and deposited them with its other assets of like character. It does not appear that any special mark was put upon them, or that a thing was done to distinguish them from the other effects of the bank with which they were min-

gled. Upon the face of the transaction it was a simple sale by the Second National Bank, whereby the entire title and property became vested in the plaintiff. But gold was then at a premium of forty per cent in currency. The Merchants' Bank paid but twenty-five, according to the contract between the bank and Mellen, Ward, & Co. The latter were to pay, and it is presumed did pay, the additional fifteen per cent. This was a part of the consideration upon which the Merchants' Bank entered into the contract. It is evident that the bank did not agree to deliver to Mellen, Ward, & Co., the identical gold certificates which were purchased, but gold, or its equivalent in certificates to the same amount, and any gold, or any certificates would have satisfied the contract. The bank cannot, therefore, be regarded as holding the certificates in pledge. The want of the element, that the identical certificates were to be delivered, is conclusive against that view of the subject. If Mellen, Ward, & Co. had tendered performance and called for gold, and the bank had failed to respond, Mellen, Ward, & Co. could have sustained an action for the breach of the contract. But they could not have maintained detinue, trover, or replevin against the bank. The real character of the transaction was, that the bank took the title and entire property, but Mellen, Ward, & Co. had the right to purchase from the bank the like amount of gold, or its equivalent in certificates, according to the terms of the contract, which were, that they should pay what the bank paid, compensation for its trouble, and interest from the time the purchase by the bank was made.

In respect to the \$50,000 of gold and gold certificates delivered by the teller in the absence of the cashier, and the excess of gold certificates over \$400,000 delivered by the cashier, the facts are substantially the same as those in regard to the \$400,000, except that the excess of certificates, and what was delivered by the teller, had reference to gold and gold certificates deposited in the bank by Mellen, Ward, & Co. This difference is not material. With this qualification the same remarks apply which have been made touching the \$100,000 of certificates, and we are led to the same legal conclusions.

The transactions between the State Bank and the Merchants' Bank were apparently of the same character as that between the Merchants' Bank and the Second National Bank. What the understanding between Mellen, Ward, & Co. and the defendant was is not disclosed in the evidence. But it is fairly to be inferred that it was the same as that between them and the Merchants' Bank. When the arrangement was proposed by Carter to Fuller, on the twenty-second of February, Carter said that "when the gold was taken from the Merchants' Bank he thought it would go through some other bank or banks." The assent of Mellen, Ward, & Co., to the sale to the State Bank by the Merchants' Bank extinguished their claim upon the latter. The Merchants' Bank certainly had a title of some kind, and whatever it was it passed to the State Bank unless the contract was void, because the State Bank had no corporate power, or its cashier had no authority to make the purchase. The act of Congress expressly authorizes the banks created under it to buy and sell coin. No question of *ultra vires* is therefore involved.

If the Merchants' Bank held the certificates as a pledge, it had a special property which might be sold and assigned. The assignee in such cases becomes invested with all the legal rights which belonged to the assignor. Such is the

rule of the common law, and it has subsisted from an early period. *Mores v. Conham*, Owen, 123; *Anon.*, 2 Salk. 522; *Coggs v. Bernard*, 3 Salk. 268; *Whitaker v. Sumner*, 20 Pick. 399; *Thompson v. Patrick*, 4 Watts, 414; Story, *Bailments*, § 324.

But we are entirely satisfied with the other view we have expressed upon the subject. *Modus et conventio vincunt legem*.

It is insisted by the defendant's counsel that the transaction was a loan to Mellen, Ward, & Co. As the bank parted with its title, if there were a loan in the eye of the law, it would not in any wise affect the conclusions at which we have arrived.

Recurring to the subject of the authority of the cashier of the State Bank to make the purchase, and excluding from consideration for the present the certified checks, three views, we think, may be properly taken of the case in this aspect:—

1. If the certificates and the gold actually went into the State Bank, as was admitted by Smith to Havens, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase, and this question should have been submitted to the jury.

2. It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that Smith had authority to bind the defendant by the contract which he made with the Merchants' Bank.

3. Where a party deals with a corporation in good faith, the transaction is not *ultra vires*, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

The jury should have been instructed to apply this rule to the evidence before them.

The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this Court. *Supervisors v. Schenck*, 5 Wall. 772, 784; *Knox Co. v. Aspinwall*, 21 How. 539; *Bissell v. Jeffersonville*, 24 id. 288; *Moran v. Miami Co.*, 2 Black, 722; *Gelpcke v. Dubuque*, 1 Wall. 175, 203; *Mercer Co. v. Hackett*, ib. 83, 93; *Mayor v. Lord*, 9 id. 409, 414; *Royal British Bank v. Turquand*, 6 Ellis & Bl. 327; *The Farmers' Loan and Trust Co. v. Curtis*, 3 Seld. 466; *Stoney v. American Life Ins. Co.*, 11 Paige, 635; *Society for Savings v. New London*, 29 Conn. 174; *Commonwealth v. The City of Pittsburg*, 34 Penn. 497; *Commonwealth v. Alleghany County*, 37 id. 277.

Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application. *Philadelphia and Baltimore R. Co. v. Quigley*, 21 How. 202, 209; *Green v. London Omnibus Co.*, 7 C. B. N. s. 290; *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31.

Corporations are liable for the acts of their servants while engaged in the

business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances. *Ranger v. The Great Western R. Co.*, 5 H. L. Cas. 86; *Thayer v. Boston*, 19 Pick. 511; *Frankfort Bank v. Johnson*, 24 Me. 490; *Angell and Ames, Corporations*, §§ 382, 388.

Estoppel *in pais* presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences, and cast the burden upon another. *Swan v. North British &c. Co.*, 7 Hurl. & N. 603; *Hern v. Nichols*, 1 Salk. 289. Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice the loss should fall upon the defendant. The ethics and the law of the case alike require this result. *Dezell v. Odell*, 3 Hill, 216.

Those who created the trust, appointed the trustee, and clothed him with the powers that enabled him to mislead, — if there were any misleading, — ought to suffer rather than the other party. *Farmers' and Mechanics' Bank of Kent Co. v. Drovers' and Butchers' Bank*, 16 N. Y. 125, 133; *Welland Canal Co. v. Hathaway*, 8 Wend. 480.

In the *Bank of The United States v. Davis*, 2 Hill, 451, 465, *Nelson, C. J.*, said: "The plaintiff's appointed the director, and held him out to their customers and the public as entitled to confidence. They placed him in a position where he has been enabled to commit this fraud."

The directors had fraudulently appropriated the proceeds of a bill discounted for the drawer. It was held the drawer was not liable.

The reasoning of Justice *Selden*, in the *Farmers' and Mechanics' Bank of Kent v. The Butchers' and Drovers' Bank*, *supra*, is also strikingly apposite in the case before us. He said: "The bank selects its teller, and places him in a position of great responsibility. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank, and within the scope of his employment, so far as is known or can be seen by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be responsible?"

The same principle was applied in the *New York and New Haven Railroad Co. v. Schuyler*, 38 Barb. Sup. Ct., 536; s. c. affirmed, 34 N. Y. 30.

It was explicitly laid down by Lord *Holt*, in *Hern v. Nichols*, 1 Salk. 289. He there said: "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger," "and upon this the plaintiff had a verdict."

Smith, by his conduct, if not by his declarations, avowed his authority to buy the certificates and gold in question, from the Merchants' Bank, and the bank, under the circumstances, had a right to believe him.

We have thus far examined the testimony as if the certified checks were void, or had not been given. It remains to consider that branch of the case. Bank-checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be main-

tained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud. *Grant, Banking*, 89, 90; *Keene v. Beard*, 8 Com. B. N. S. 372;¹ *Serle v. Norton*, 2 Moody & R. 404, note; *Boehm v. Sterling*, 7 T. R. 423, 430; *Alexander v. Burchfield*, 7 Man. & G. 1061.

All the authorities, both English and American, hold that a check *may* be accepted, though acceptance is not usual. *Robson v. Bennet*, 2 Taunt. 388, 395; *Grant, Banking*, 89; *Chitty, Bills* (10th ed.), 261; *Boyd v. Emmerson*, 2 Adol. & Ellis, 184; *Kilshy v. Williams*, 5 Barn. & Ald. 816; *Story, Promissory Notes*, §§ 489, 490.

By the law merchant of this country the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good; and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until, in the course of business, it goes back to the bank for redemption, and is extinguished by payment.

It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion.

A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in "a certified check account," and when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process.

The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money.

It is computed by a competent authority that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than one hundred millions of dollars.

¹ *Ante*, 718.

We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity.

Our conclusions as to their legal effect are supported by authorities of great weight: *Bickford v. First National Bank*, 42 Ill. 238; *Willets v. Phoenix Bank*, 2 Duer, 121; *Barnet v. Smith*, 10 Foster (N. H.), 256; *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 4 Duer, 219; 14 N. Y. 624; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Brown v. Leckie et al.*, 43 Ill. 497; *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92.

Congress has made them the subject of taxation by name. 13 St. 278.

But it is strenuously denied that the cashier had authority to certify the checks in question. To this there are two answers:—

1. In considering the question of his authority to buy the gold, the evidence that he had given his checks for loans to his bank, and for the proceeds of discounts, was fully considered. Our reasoning and the authorities cited upon that subject apply here with equal force. We need not go over the same ground again. The questions whether the requisite authority was not inferable, and whether the principle of estoppel *in pais* did not apply, should in this connection also have been left to the jury.

2. As before remarked, the organic law expressly allowed the bank to buy coin and bullion. We have also adverted to the provisions of the by-laws, that the cashier shall be responsible "for the moneys, funds, and all other valuables of the bank;" and that "all contracts, checks, drafts, receipts, &c., shall be signed either by the cashier or president." The power of the bank to certify checks has also been sufficiently examined. The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office. *Wild v. The Bank of Passamaquoddy*, 3 Mason, 505; *Burnham v. Webster*, 19 Me. 232; *Elliot v. Abbott*, 12 N. Hamp. 549, 556; *Bank of Vergennes v. Warren*, 7 Hill, 91; *Lloyd v. The West Branch Bank*, 15 Penn. St. 172; *Badger v. The Bank of Cumberland*, 26 Me. 428; *Bank of Kentucky v. The Schuylkill Bank*, 1 Parsons Sel. Ca., 182; *Fleckner v. Bank of United States*, 8 Wheat. 338, 360.

The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown. *Commercial Bank of Lake Erie v. Norton et al.*, 1 Hill, 501; *Bank of Vergennes v. Warren*, 7 Hill, 91; *Beers v. The Phoenix Glass Co.*, 14 Barb. 358; *Farmers' and Mechanics'*

Bank *v.* Butchers' and Drovers' Bank, 14 N. Y. 624; North River Bank *v.* Aymer, 3 Hill, 262, 268; Barnes *v.* Ontario Bank, 19 N. Y. 156, 166.

The foundation upon which this liability rests was considered in an earlier part of this opinion. Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly.

In Barnes *v.* The Ontario Bank, 19 N. Y. 156, the cashier had issued a false certificate of deposit. In the Farmers' and Mechanics' Bank *v.* The Butchers' and Drovers' Bank, 14 N. Y. 624; s. c., 16 N. Y. 133; and in Mead *v.* The Merchants' Bank of Albany, 25 N. Y. 146, the teller had fraudulently certified a check to be good. In each case the bank was held liable to an innocent holder.

It is objected that the checks were not certified by the cashier at his banking-house. The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force in this objection. Bank of Augusta *v.* Earle, 13 Peters, 519; Pendleton *v.* Bank of Kentucky, 1 T. B. Monroe, 182.

It is also objected that each of the checks, after being certified, required an additional stamp. The act of Congress relating to the subject directs certified checks to be included in the circulation of the bank for the purpose of taxation. 13 St. 278, c. 173, § 110. This is a conclusive answer to the objection.

In Brown *v.* London, 1 Levinz, 298, judgment in a suit upon two accepted bills of exchange was arrested after verdict because "entire damages" were given, and the count, upon one of the bills, failed to aver that by the custom of merchants and others trading in England the acceptor was obliged to pay. This was in 1671. Other decisions in this class of cases, not less remarkable, are familiar to those versed in the learning of the elder reports. The law merchant was not made. It grew. Time and experience, if slower, are wiser law-makers than legislative bodies. Customs have sprung from the necessities and the convenience of business and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions.

We have disposed of this case as it is before us. How far it may be changed in its essential character, if at all, by a full development of the evidence on both sides in the further trial, which will doubtless take place, it is not for us to anticipate.

The judgment below is reversed, and a *venire de novo* will be awarded. Clifford and Davis, JJ., dissented.

See also Clark National Bank *v.* Bank of Albion, 52 Barb. 592; Irving Bank *v.* Wetherald, 36 N. Y. 335.

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UNIT

RECEIVED

CALIFORNIA

LOS ANGELES





AA

